TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 731

SAMUEL S. KOENIG, JOHN J. KNEWITZ, AND WILLIAM L. WARD, PETITIONERS,

vs.

EDWARD J. FLYNN, SECRETARY OF STATE OF THE STATE OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED FEBRUARY 25, 1932

CERTIORARI GRANTED MARCH 15, 1932

(36,545)

(36,545)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 16, 1932

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Supreme Court,

APPELLATE DIVISION—THIRD DEPARTMENT.

IN THE MATTER

OF

The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Mandamus Order,

Petitioners,

against

EDWARD J. FLYNN, Secretary of State of the State of New York,

Respondent,

and

JAMES A. FARLEY, Chairman of the Democratic State Committee,

Intervener-Respondent.

Statement Under Rule 234.

This proceeding was instituted by the service of the notice of motion and petition on October 2nd, 1931.

The answer to the petition was served on October 13th, 1931.

The names of the original petitioners are Samuel S. Koenig, John J. Knewitz and William L. Ward.

The name of the original respondent is Edward J. Flynn, Secretary of State of the State of New York.

Statement Under Rule 23A.

James A. Farley, Chairman of the Democratic State Committee, was permitted to intervene by order of the Court dated October 15th, 1931.

The petitioners' attorneys are Abraham S. Gilbert and Benjamin L. Fairchild.

The attorney for respondent, Edward J. Flynn, Secretary of State of the State of New York, is John J. Bennett, Jr., Attorney General.

The attorney for the intervener-respondent is John Godfrey Saxe.

There have been no changes of parties or attorneys herein.

Notice of Appeal.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF ALBANY.

IN THE MATTER

OF

The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Mandamus Order,

Petitioners,

against

EDWARD J. FLYNN, Secretary of State of the State of New York,

Respondent,

and

JAMES A. FARLEY, Chairman of the Democratic State Committee,

Intervener-Respondent.

SIRS:

PLEASE TAKE NOTICE that the petitioners, Samuel S. Koenig, John J. Knewitz and William L. Ward appeal to the Appellate Division of the Supreme Court, Third Department, from the order made and entered herein by Honorable Ellis J. Staley and filed in the office of the Clerk of the County of Albany on the 12th day of November, 1931, denying petitioners' application for a mandamus order against the respondent Edward J. Flynn, Secretary

of State of the State of New York, and from each and every part of said order.

Dated, New York, November 12, 1931.

Yours, &c.,

ABRAHAM S. GILBERT,
BENJAMIN L. FAIRCHILD,
Attorneys for Petitioners,
Office & P. O. Address,
Room 2810, No. 10 East 40th St.,
11 Borough of Manhattan,
New York City.

To:

Hon. JOHN J. BENNETT, JR.,
Attorney General, Attorney for
respondent Edward J. Flynn,
Secretary of State.

JOHN GODFREY SAXE, Esq.,
Attorney for James A. Farley,
Chairman of the Democratic
State Committee.

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Order Appealed From.

At a Special Term of the Supreme Court, Albany County, held in the City of Kingston, on the 15th day of October, 1931.

Present—Honorable ELLIS J. STALEY, *Justice.*

IN THE MATTER
OF

The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Mandamus Order,

Petitioners,

against

EDWARD J. FLYNN, Secretary of State of the State of New York,

Respondent,

and

JAMES A. FARLEY, Chairman of the Democratic State Committee,

Intervener-Respondent.

The petitioners having moved this Court for a peremptory mandamus order directing the respondent Edward J. Flynn, as Secretary of the State of New York, in issuing his certificate or certificates in the year 1932, pursuant to the Election Law of the State of New York to the Board of Elections of each county of the State of New York and of the City of New York, certifying who may lawfully be voted for at the general election to be held in 1932, to certify that forty-five Representatives in the House of Rep-

16 *Order Appealed From.*

resentatives of the Congress of the United States in the Seventy-third Congress are to be elected in the Congressional Districts as defined in the Concurrent Resolution of the Senate and Assembly of the State of New York, adopted April 10th, 1931, entitled "Concurrent Resolution of the Senate and Assembly, constituting the Legislature of the State of New York, subdividing the State of New York into forty-five Congressional Districts and defining the boundaries thereof", and that he be directed to perform every other duty devolving on him under the Election Law pertaining to any matter con-
17 tained in said Concurrent Resolution in accordance with said Concurrent Resolution, and not otherwise, and for such other and further relief as may be just and proper,

Now, after reading and filing the petition dated and verified October 1st, 1931, and the answer of the respondent Edward J. Flynn thereto, verified October 13th, 1931, and the court having granted the motion of James A. Farley, Chairman of the Democratic State Committee, to intervene as a respondent, and said intervener respondent James A. Farley having joined in the answer interposed by
18 the respondent Edward J. Flynn, Secretary of State, and both respondents having withdrawn the denials contained in said answer to the allegations contained in paragraphs "Twelfth" and "Thirteenth" of the petition, and upon the argument the petitioners having conceded that the petition was for a peremptory order of mandamus, and the Court having heard Abraham S. Gilbert and Benjamin L. Fairchild of counsel for petitioners in support of the motion, and Hon. Henry Epstein, Deputy At-

torney General, for the respondent Edward J. Flynn, Secretary of State, and Hon. Robert F. Wagner and Hon. John J. O'Connor, counsel for intervener-respondent James A. Farley, Chairman of the Democratic State Committee, and

Now, after due consideration, it is

ORDERED that the said motion for a peremptory mandamus order be and the same hereby is denied as matter of law and not in the exercise of discretion, without costs.

Enter,

ELLIS J. STALEY,
J. S. C.

22 **Notice of Motion for Mandamus.**

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF ALBANY.

IN THE MATTER

of

The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Mandamus Order

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against

EDWARD J. FLYNN, Secretary of State of the State of New York.

TO HONORABLE EDWARD J. FLYNN, SECRETARY OF STATE OF THE STATE OF NEW YORK:

PLEASE TAKE NOTICE that the petitioners above-named will move this Court at a Special Term thereof to be held at the City of Albany, County of Albany, State of New York, on the 10th day of October, 1931, at 10 o'clock in the forenoon of that day, for a mandamus order directing the respondent, Edward J. Flynn, as Secretary of State of the State of New York, in issuing his certificate or certificates in the year 1932 pursuant to the Election Law of the State of New York to the Board of Election of each county in the State of New York, and of the City of New York, certifying who may lawfully be voted for at the general election to be held in 1932, to certify that forty-five Representatives in the House of Representatives of the Con-

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gress of the United States in the Seventy-third Congress are to be elected in the Congressional Districts as defined in the Concurrent Resolution of the Senate and Assembly of the State of New York, adopted April 10th, 1931, entitled "Concurrent Resolution of the Senate and Assembly, constituting the Legislature of the State of New York, subdividing the State of New York into forty-five Congressional Districts and defining the boundaries thereof", Exhibit D hereto annexed, and that he be directed to perform every other duty devolving on him under the Election Law pertaining to 26
any matter contained in said Concurrent Resolution in accordance with said Concurrent Resolution, and not otherwise, and for such other and further relief as may be just and proper.

Dated, New York, October 1st, 1931.

Yours, etc.,

ABRAHAM S. GILBERT,
BENJAMIN L. FAIRCHILD,
Attorneys for Petitioners,
Office Address,
Room 2810, 27
No. 10 East 40th Street,
Borough of Manhattan,
New York City.

28 **Petition for Mandamus.**

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF ALBANY.

IN THE MATTER

of

The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Man-
29 damus Order

against

EDWARD J. FLYNN, Secretary of State of the State of New York.

The petitioners by Abraham S. Gilbert and Benjamin L. Fairchild, their attorneys, for their petition herein allege:

FIRST: That they are severally citizens and qualified voters of the State of New York, and that the
30 petitioner Samuel S. Koenig is the Chairman of the Republican County Committee of New York County; that the petitioner John J. Knewitz is the Chairman of the Republican County Committee of Bronx County; and that the petitioner William L. Ward is the Chairman of the Republican County Committee of Westchester County.

SECOND: That the respondent is the Secretary of State of the State of New York, and that his term of office will expire on December 31st, 1932.

THIRD: That the Congress of the United States, pursuant to the provisions of the Constitution of the United States, by the Act of Congress of June 18th, 1929, duly provided for the taking of the Fifteenth and subsequent decennial censuses of the people of the United States and otherwise as in said Act of Congress provided, of which a copy is hereto annexed as Exhibit "A" and reference thereto is made as fully as if herein set forth at length.

FOURTH: That said Act of Congress of June 18th, 1929, provided, among other things, that following the taking of the Fifteenth Census, the President of the United States should transmit to Congress a Statement showing the population figures in each State and the number of Representatives to which each State would be entitled as prescribed in said Act of Congress.

FIFTH: That in conformity with the provisions of the Act of June 18th, 1929, the President duly transmitted to the Congress a message under date of December 4th, 1930, with a statement showing the population of the various States under the Fifteenth (1930) Census and the number of Representatives to which each State would be entitled under an apportionment of the existing number of Representatives as directed to be made in and by said Act of Congress, and that the Congress to which such statement of the President was transmitted failed to enact a law apportioning Representatives among the several States. A copy of said message of the President and of said statement is hereto annexed as Exhibit "B" and reference thereto made as fully as if herein set forth at length.

34 *Petition for Mandamus.*

SIXTH: That on March 4th, 1931, the Clerk of the House of Representatives duly certified to the Governor of the State of New York pursuant to said Act of Congress of June 18th, 1929, as follows: "The State of New York shall be entitled in the Seventy-third Congress and in each Congress thereafter until the taking effect of a re-apportionment under said Act or subsequent statute, to forty-five (45) Representatives in the House of Representatives of the Congress of the United States", and thereby duly certified that the number of Represen-
35 tatives of the State of New York in the House of Representatives in the Seventy-third Congress was forty-five instead of forty-three as heretofore. A copy of said certificate is hereto annexed as Exhibit "C" and reference thereto made as fully as if herein set forth at length.

SEVENTH: That on April 10th, 1931, the Senate and Assembly of the State of New York adopted a Concurrent Resolution, a copy of which is hereto annexed as Exhibit "D" and reference thereto made as fully as if herein set forth at length, and that said Concurrent Resolution was not submitted to
36 the Governor under Section 9 of Article IV of the Constitution of the State of New York.

EIGHTH: That the last subdivision or districting of the State of New York into Congressional Districts prior to the adoption of said Concurrent Resolution of April 10, 1931, was by chapter 890 of the Laws of 1911 of the State of New York, as amended, and that said Act and Amendments subdivided the State into forty-three Congressional Districts pursuant to the Act of Congress of August 8th, 1911, and apportioned to the County of New York

37

10 Congressional Districts and fractions or parts of two additional Congressional Districts, to the County of Bronx one Congressional District and fraction or parts of two additional Congressional Districts, and to the County of Westchester fractions or parts of two Congressional Districts.

NINTH: That as will more fully appear from said Concurrent Resolution of April 10, 1931, it purports to apportion to the County of New York six Congressional Districts, to the County of Bronx four Congressional Districts, and to the County of Westchester two Congressional Districts.

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TENTH: That pursuant to the provisions of section 69 of the Election Law of the State of New York, it is the duty of the respondent, as Secretary of State, at least three months before the general election to be held in November, 1932, to make and transmit to the Boards of Elections of each county of the State and of the City of New York a certificate or certificates stating, among other things, the number of Representatives in Congress who may be lawfully voted for at such election by the voters of the respective counties of the State.

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ELEVENTH: That on or about the 4th day of August, 1931, Honorable John J. Bennett, Jr., as Attorney General of the State of New York, in a communication addressed to the respondent above named, as Secretary of State, and published in the press of the State, rendered his opinion and advised said respondent that the said Concurrent Resolution of the Senate and Assembly of the State of New York, adopted April 10th, 1931, Exhibit "D" hereto annexed, was ineffective, and advised the re-

spondent as Secretary of State that in issuing his certificate or certificates pursuant to section 69 of the Election Law at least three months prior to the general election to be held in November, 1932, it would be his official duty to disregard the said Concurrent Resolution of April 10th, 1931, and treat the same as ineffective, and issue his certificate or certificates for the election of Representatives in Congress in accordance with the provisions of chapter 890 of the Laws of 1911, as amended. That said Attorney General is a constitutional officer of the State of New York and is the head of the department of law, and that as such he is the legal adviser of all departments of the State, including that of this respondent, and has charge and control of all legal matters in which any department requires the services of an attorney or counsel, except the Military Department.

TWELFTH: That following the publication of such opinion and advice of the Attorney General of the State of New York to the respondent, as Secretary of State, the petitioners above named duly demanded of the Secretary of State that in issuing his certificate or certificates under section 69 of the Election Law with respect to the election of Representatives in Congress at the general election to be held in November, 1932, he certify that the voters of the various counties of the State of New York would be entitled to vote at the general election to be held in November, 1932, for the number of Representatives in Congress prescribed and provided for in and pursuant to the provisions of said Concurrent Resolution of April 10, 1931, Exhibit "D" hereto annexed.

THIRTEENTH: That the respondent, Secretary of State, has neglected and refused to advise your petitioners that he will comply with said demand, and on information and belief, your petitioners allege that the respondent intends to be governed by and to follow the opinion of the Attorney General and intends to treat the said Concurrent Resolution, Exhibit "D" hereto annexed as ineffective, and further intends to certify to the Board of Elections of each county and of the City of New York that Representatives in Congress should be elected by the people of the State of New York at the general election to be held in November, 1932, in the Districts prescribed in and by chapter 890 of the Laws of 1911, as amended.

FOURTEENTH: That the controversy involved in this cause brings into question the construction of section 4 of Article I of the Constitution of the United States and of the Acts of Congress of August 8th, 1911, and June 18th, 1929, as well as the validity, effectiveness and constitutionality of said Concurrent Resolution of April 10th, 1931, Exhibit "D" hereto annexed.

FIFTEENTH: That the general election to be held in November, 1932, will be held on November 7th, 1932, and that the certificate of the Secretary of State, pursuant to section 69 of the Election Law, is required by said section to be filed with the various Boards of Election at least three months prior thereto, to wit: not later than the 7th day of August, 1932.

SIXTEENTH: That it is a matter of grave public importance that the various questions presented by

the controversy thus arising between the petitioners and the respondent as Secretary of State of the State of New York shall be disposed of at the earliest possible date by the courts, to the end that the public officers of the State of New York on whom the duty is imposed to carry out the provisions of the New York Election Law will know definitely whether or not they are to be governed as to their various public acts by said Concurrent Resolution of April 10th, 1931, Exhibit "D" hereto annexed, and that the prompt consideration of the questions presented is also essential because of necessary
47 steps under the Election Law which must be taken long prior to the issuance of the certificates by the respondent, as Secretary of State, pursuant to section 69 of the Election Law.

WHEREFORE the petitioners above-named pray that a mandamus order issue out of and under the seal of this court, directing the respondent, Edward J. Flynn, as Secretary of State of the State of New York, in issuing his certificate or certificates in the year 1932 pursuant to the Election Law of the State of New York to the Board of Elections of each county in the State of New York and of the
48 City of New York, certifying who may lawfully be voted for at the general election to be held in 1932, to certify that forty-five Representatives in the House of Representatives of the Congress of the United States in the Seventy-third Congress are to be elected in the Congressional Districts as defined in the Concurrent Resolution of the Senate and Assembly of the State of New York, adopted April 10th, 1931, entitled "Concurrent Resolution of the Senate and Assembly, constituting the Legislature of the State of New York, subdividing the State of New York into forty-five Congressional

Districts and defining the boundaries thereof", Exhibit "D" hereto annexed, and that he be directed to perform every other duty devolving on him under the Election Law pertaining to any matter contained in said Concurrent Resolution in accordance with said Concurrent Resolution, and not otherwise, and for such other and further relief as may be just and proper.

Dated, October 1st, 1931.

SAMUEL S. KOENIG,
JOHN J. KNEWITZ,
WILLIAM L. WARD, 50
(Petitioners).

ABRAHAM S. GILBERT,
BENJAMIN L. FAIRCHILD,
Attorneys for Petitioners.

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

WILLIAM L. WARD, being duly sworn, says:

That he is one of the petitioners named in the above-entitled proceeding. That he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. 51

WILLIAM L. WARD.

Sworn to before me this
1st day of October, 1931.

FREDERICK W. DEARING,
Notary Public,
Westchester County.
(Seal)

52 **Exhibit "A".**

[PUBLIC—No. 13—71ST CONGRESS]

[S. 312]

An Act To provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a census of population, agriculture, irrigation, drainage, distribution, unem-
53 ployment, and mines shall be taken by the Director of the Census in the year 1930 and every ten years thereafter. The census herein provided for shall include each State, the District of Columbia, Alaska, Hawaii, and Porto Rico. A census of Guam, Samoa, and the Virgin Islands shall be taken in the same year by the respective governors of said islands and a census of the Panama Canal Zone by the Governor of the Canal Zone, all in accordance with plans prescribed or approved by the Director of the Census.

SEC. 2. That the period of three years beginning
54 the 1st day of January in the year 1930 and every tenth year thereafter shall be known as the decennial census period, and the reports upon the inquiries provided for in said section shall be completed within such period: *Provided,* That the tabulation of total population by States as required for the apportionment of Representatives shall be completed within eight months from the beginning of the enumeration and reported by the Director of the Census to the Secretary of Commerce and by him to the President of the United States.

Exhibit "A".

SEC. 3. That there may be employed in the Bureau of the Census, in addition to the force provided for by the appropriation Act for the fiscal year immediately preceding the decennial census period, two assistant directors, one of whom shall act as executive assistant to the director, performing, in addition, the duties usually assigned to the chief clerk, and the other, who must be a person of known and tried experience in statistical work, as technical and statistical advisor; these officials to be appointed by the Secretary of Commerce, upon the recommendation of the Director of the Census, in conformity with the civil service laws and rules.

In addition to the force hereinbefore provided for, there may be appointed by the Director of the Census, without regard to the provisions of the Classification Act, for any period not extending beyond the decennial census period, at rates of compensation to be fixed by him, as many temporary employees in the District of Columbia as may be necessary to meet the requirements of the work: *Provided,* That census employees who may be transferred to any such temporary positions shall not lose their permanent civil-service status by reason of such transfer: *Provided further,* That hereafter in making appointments to clerical and other positions in the executive branch of the Government in the District of Columbia or elsewhere preference shall be given to honorably discharged soldiers, sailors, and marines, and widows of such, and to the wives of injured soldiers, sailors, and marines, who themselves are not qualified, but whose wives are qualified, to hold such positions: *Provided further,* That all such temporary appointments shall be made in conformity with the civil service laws and rules: *Provided further,* That in

58 *Exhibit "A".*

making any appointments under this Act to positions in the District of Columbia or elsewhere, preference shall be given to persons discharged under honorable conditions from the military or naval forces of the United States who served in such force during the time of war and were disabled in the line of duty, to their widows, and to their wives if the husband is not qualified to hold such positions.

That special agents, supervisors, supervisors' clerks, enumerators, and interpreters may be ap-
59 pointed by the Director of the Census to carry out the provisions of this Act and of the Act to provide for a permanent Census Office, approved March 6, 1902, and Acts amendatory thereof or supplemental thereto, such appointments to be made without regard to the Civil Service laws or the Classification Act of 1923, as amended, except that such special agents shall be appointed in accordance with the Civil Service laws. The Director of the Census may delegate to the supervisors authority to appoint enumerators. The enlisted men and officers of the Army, Navy, and Marine Corps may be appointed and compensated for the enumeration of Army,
60 Navy, and Marine, and other military posts. Employees of the Department of Commerce and other departments and independent officers of the Government may, with the consent of the head of the respective department or office, be employed and compensated for field work in connection with the Fifteenth Decennial Census. The special agents, supervisors, supervisors' clerks, enumerators, and interpreters thus appointed shall receive compensation at rates to be fixed by the director of the Census: *Provided,* That special agents appointed

at a per diem rate shall not be paid in excess of $8 per diem except as hereinafter provided; and that the compensation on a piece-price basis may be fixed without limitation as to the amount earned per diem: *Provided further,* That during the decennial census period the Director of the Census may fix the compensation of not to exceed twenty-five special agents at an amount not to exceed $12 per diem: *Provided further,* That permanent employees of the Census Office and special agents may be detailed, when necessary, to act as supervisors or enumerators, such permanent employes and special agents to have like authority with and perform the same duties as the supervisors or enumerators in respect to the subjects committed to them under this Act.

SEC. 4. That the fifteenth and subsequent censuses shall be restricted to inquiries relating to population, to agriculture, to irrigation, to drainage, to distribution, to unemployment, and to mines. The number, form, and subdivision of the inquiries in the schedules used to take the census shall be determined by the Director of the Census, with the approval of the Secretary of Commerce.

SEC. 5. That each supervisor shall perform such duties as may be imposed upon him by the Director of the Census in the enforcement of this Act, and the duties thus imposed shall be performed in any and all particulars in accordance with the orders and instructions of the Director of the Census; that each enumerator or other employee detailed to serve as enumerator shall be charged with the collection in his subdivision of the facts and statistics called for on the population and agricutural schedules, and such other schedules as the Director of

64 *Exhibit "A".*

the Census may determine shall be used by him in connection with the census. It shall be the duty of each enumerator to visit personally each dwelling house in his subdivision, and each family therein, and each individual living out of a family in any place of abode, and by inquiry made of the head of each family, or of the member thereof deemed most competent and trustworthy, or of such individual living out of a family, to obtain each and every item of information and all particulars required for the census; and in case no person shall be found at the
65 usual place of abode of such family, or individual living out of a family, competent to answer the inquiries, then it shall be lawful for the census employee to obtain the required information as nearly as may be practicable from the family or families or person or persons living nearest to such place of abode who may be competent to answer such inquiries.

SEC. 6. That the census of the population and of agriculture required by section 1 of this Act shall be taken as of the 1st day of April, and it shall be the duty of each enumerator to commence the enu-
66 meration of his district on the day following unless the Director of the Census in his discretion shall change the date of commencement of the enumeration in said district by reason of climatic or other conditions which would materially interfere with the proper conduct of the work; but in any event it shall be the duty of each enumerator to prepare the returns hereinbefore required to be made and to forward the same to the supervisor of his district within thirty days from the commencement of the enumeration of his district: *Provided,* that in any city having two thousand five hundred inhabitants

or more under the preceding census the enumeration of the population shall be completed within two weeks from the commencement thereof.

SEC. 7. That if any person shall receive or secure to himself any fee, reward, or compensation as a consideration for the appointment or employment of any person as supervisor, enumerator, or clerk, or other employee, or shall in any way receive or secure to himself any part of the compensation paid to any supervisor, enumerator, clerk, or other employee, he shall be deemed guilty of a felony, and 68
upon conviction thereof shall be fined not more than $3,000 or be imprisoned not more than five years, or both.

SEC. 8. That any supervisor, supervisor's clerk, enuremator, interpreter, special egant, or other employee who, having taken and subscribed the oath of office, shall, without justifiable cause, neglect or refuse to perform the duties enjoined on him by this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding $500; or if he shall, without the authority of the Director of the Census, publish or commu- 69
nicate any information coming into his possession by reason of his employment under the provisions of this Act, or the Act to provide for a permanent Census Office or Acts amendatory thereof or supplemental thereto, he shall be guilty of a felony and upon conviction thereof shall be fined not to exceed $1,000 or be imprisoned not to exceed two years, or both so fined and imprisoned in the discretion of the court; or if he shall willfully and knowingly swear or affirm falsely as to the truth of any statement required to be made or subscribed by him un-

der oath by or under authority of this Act or of the Act to provide for a permanent Census Office or Acts amendatory thereof or supplemental thereto, he shall be deemed guilty of perjury, and upon conviction thereof shall be fined not exceeding $2,000 or imprisoned not exceeding five years, or both; or if he willfully and knowingly make a false certificate or a fictitious return he shall be guilty of a felony, and upon conviction of either of the last-named offenses he shall be fined not exceeding $2,000 or be imprisoned not exceeding five years, or both; or if any person who is or has been an enumerator shall knowingly or willfully furnish or cause to be furnished, directly or indirectly, to the Director of the Census or to any supervisor or other employee of the census any false statement or false information with reference to any inquiry for which he was authorized and required to collect information, he shall be guilty of a felony, and upon conviction thereof shall be fined not exceeding $2,000 or be imprisoned not exceeding five years, or both.

SEC. 9. That it shall be the duty of all persons over eighteen years of age when requested by the Director of the Census, or by any supervisor, enumerator, or special agent, or other employee of the Census Office, acting under the instructions of said director, to answer correctly, to the best of their knowledge, all questions on the census schedules applying t othemselves and to the families to which they belong or are related, and to the farm or farms of which they or their families are the occupants; and any person over eighteen years of age who, under the conditions hereinbefore stated, shall refuse or willfully neglect to answer any of these ques-

tions, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding $100 or be imprisoned not exceeding sixty days, or both, and any such person who shall willfully give answers and are false shall be fined not exceeding $500 or be imprisoned not exceeding one year, or both.

And it is hereby made unlawful for any individual, committee, or other organization of any kind whatsoever, to offer or render to any supervisor, supervisor's clerk, enumerator, interpreter, special agent, or other officer or employee of the Census 74
Office engaged in making an enumeration of population, either directly or indirectly, any suggestion, advice, or assistance of any kind, with the intent or purpose of causing an inaccurate enumeration of population to be made, either as to the number of persons residing in any district or community, or in any other respect; and any individual, or any officer or member of any committee or other organization of any kind whatsoever, who directly or indirectly offers or renders any such suggestion, advice, information, or assistance, with such unlawful intent or purpose, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined 75
not exceeding $1,000, or be imprisoned for not exceeding one year, or both.

And it shall be the duty of every owner, proprietor, manager, superintendent, or agent of a hotel, apartment house, boarding or lodging house, tenement, or other building, when requested by the Director of the Census, or by any supervisor, enumerator, special agent, or other employee of the Census Office, acting under the instructions of the said director, to furnish the names of the occupants of said hotel, apartment house, boarding or lodging

house, tenement, or other building, and to give thereto free ingress and egress therefrom to any duly accredited representative of the Census Office, so as to permit the collection of statistics for census purposes, including the proper and correct enumeration of all persons having their usual place of abode in said hotel, apartment house, boarding or lodging house, tenement, or other building; and any owner, proprietor, manager, superintendent, or agent of a hotel, apartment house, boarding or lodging house, tenement, or other building who
77 shall refuse or willfully neglect to give such information or assistance under the conditions hereinbefore stated shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding $500.

SEC. 10. That it shall be the duty of every owner, official, agent, person in charge, or assistant to the person in charge, of any company, business, institution, establishment, religious body, or organization of any nature whatsoever, to answer completely and correctly to the best of his knowledge all questions relating to his respective company, busi-
78 ness, institution, establishment, religious body, or other organization, or to records or statistics in his official custody, contained on any census schedule prepared by the Director of the Census under the authority of this Act, or of the Act to provide for a permanent Census Office, approved March 6, 1902, or of Acts amendatory thereof or supplemental thereto; and any person violating the provisions of this section by refusing or willfully neglecting to answer any of said questions, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding $500, or im-

prisonment for a period not exceeding sixty days, or both so fined and imprisoned, and any person violating the provisions of this section by willfully giving answers that are false shall be fined not exceeding $10,000 or imprisoned for a period not exceeding one year, or both.

SEC. 11. That the information furnished under the provisions of this Act shall be used only for the statistical purposes for which it is supplied. No publication shall be made by the Census Office whereby the data furnished by any particular establishment or individual can be identified, nor shall the Director of the Census permit anyone other than the sworn employees of the Census Office to examine the individual reports. 80

SEC. 12. All fines and penalties imposed by this Act may be enforced by indictment or information in any court of competent jurisdiction.

SEC. 13. That the Director of the Census is hereby authorized to make requisitions upon the Public Printer for such printing as may be necessary to carry out the provisions of this Act, to wit: Blanks, schedules, circulars, pamphlets, envelopes, work sheets, and other items of miscellaneous printing; that he is further authorized to have printed by the Public Printer, in such editions as the director may deem necessary, preliminary and other census bulletins, and final reports of the results of the several investigations authorized by this Act or by the Act to establish a permanent Census Office and Acts amendatory thereof or supplemental thereto and to publish and distribute said bulletins and reports. 81

82 *Exhibit "A".*

SEC 14. That all mail matter, of whatever class or weight, relating to the census and addressed to the Census Office, or to any official thereof, and indorsed "Official business, Census Office," shall be transmitted free of postage, and by registered mail if necessary, and so marked: *Provided*, That if any person shall make use of such indorsement to avoid the payment of postage or registry fee on his or her private letter, package, or other matter in the mail, the person so offending shall be guilty of a misdemeanor and subject to a fine of $300, to be prosecut-
83 ed in any court of competent jurisdiction.

SEC. 15. That the Secretary of Commerce, whenever he may deem it advisable, on request of the Director of the Census, is hereby authorized to call upon any other department or office of the Government for information pertinent to the work herein provided for.

SEC. 16. That there shall be in the year 1935, and once every ten years thereafter, a census of agriculture and livestock, which shall show the acreage of farm land, the acreage of the principal crops, and the number and value of domestic ani-
84 mals on the farms and ranges of the country. The schedule employed in this census shall be prepared by the Director of the Census. Such census shall be taken as of the 1st day of January and shall relate to the crop year. The Director of the Census may appoint enumerators or special agents for the purpose of this census in accordance with the provisions of the permanent census Act.

SEC. 17. That the Director of the Census be, and he is hereby, authorized and directed to collect and publish, for every second year after 1927, statistics

of manufacturing industries; and the director is hereby authorized to prepare such schedules as in his judgment may be necessary.

SEC. 18. That the Director of the Census be, and he is hereby, authorized at his discretion, upon the written request of the governor of any State or Territory or of any court of record, to furnish such governor or court of record with certified copies of so much of the population or agricultural returns as may be requested, upon the payment of the actual cost of making such copies and $1 additional 86
for certification; and that the Director of the Census is further authorized, in his discretion, to furnish to individuals such data from the population schedules as may be desired for genealogical or other proper purposes, upon payment of the actual cost of searching the records and $1 for supplying a certificate; and that the Director of the Census is authorized to furnish transcripts of tables and other records and to prepare special statistical compilations for State or local officials, private concerns, or individuals upon the payment of the actual cost of such work: *Provided, however,* That in no case shall information furnished under the au- 87
thority of this Act be used to the detriment of the person or persons to whom such information relates. All moneys hereafter received by the Bureau of the Census in payment for labor and materials used in furnishing transcripts of census records or special statistical compilations from such records shall be deposited to the credit of the appropriation for collecting statistics.

SEC. 19. That the Director of the Census may authorize the expenditure of necessary sums for the

actual and necessary traveling expenses of the officers and employees of the Census Office, including an allowance in lieu of subsistence not exceeding $6 per day during their necessary absence from the Census Office, or, instead of such an allowance, their actual subsistence expenses, not to exceed $7 per day: *Provided,* That employees of the bureau may be paid in lieu of all transportation expenses not to exceed 7 cents per mile for the use of their own automobiles or not to exceed 3 cents per mile for the use of their own motor cycles when used for
89 necessary travel on official business.

SEC. 20. For the purpose of carrying out the provisions of this Act during the fifteenth decennial census period, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $39,593,000.

SEC. 21. That the Act establishing the permanent Census Office, approved March 6, 1902, and Acts amendatory thereof and supplemental thereto, except as are herein amended, shall remain in full force. That the Act entitled "An Act to provide for the fourteenth and subsequent decennial cen-
90 suses," approved March 3, 1919, and all other laws and parts of laws inconsistent with the provisions of this Act are hereby repealed.

SEC. 22. (a) On the first day, or within one week thereafter, of the second regular session of the Seventy-first Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the fifteenth and each subse-

quent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives made in each of the following manners:

(1) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method used in the last preceding apportionment, no State to receive less than one Member;

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(2) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method known as the method of major fractions, no State to receive less than one Member; and

(3) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method known as the method of equal proportions, no State to receive less than one Member.

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(b) If the Congress to which the statement required by subdivision (a) of this section is transmitted, fails to enact a law apportioning Representatives among the several States, then each State shall be entitled, in the second succeeding Congress and in each Congress thereafter until the taking effect of a reapportionment under this Act or subsequent statute, to the number of Representatives shown in the statement based upon the method used in the last preceding apportionment. It shall be the duty of the Clerk of the last House of Repre-

sentatives forthwith to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the officer who, under section 32 or 33 of the Revised Statutes, is charged with the preparation of the roll of Representatives-elect.

(c) This section shall have no force and effect in respect of the apportionment to be made under any decennial census unless the statement required by subdivision (a) of this section in respect of such census is transmitted to the Congress within the time prescribed in subdivision (a).

Approved, June 18, 1929.

Exhibit "B".

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MESSAGE

From

THE PRESIDENT OF THE UNITED STATES

Transmitting

STATEMENT PREPARED BY THE BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE, GIVING THE WHOLE NUMBER OF PERSONS IN EACH STATE, EXCLUSIVE OF INDIANS NOT TAXED, AS ASCERTAINED UNDER THE FIFTEENTH DECENNIAL CENSUS OF POPULATION.

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December 5, 1930.—Referred to the Committee on the Census and ordered to be printed.

To the Congress of the United States:

In compliance with the provisions of section 22 (a) of the act approved June 18, 1929, I transmit herewith a statement prepared by the Bureau of Census, Department of Commerce, giving the whole number of persons in each State, exclusive of Indians not taxed, as ascertained under the Fifteenth Decennial Census of population, and the number of Representatives to which each State would be entitled under an apportionment of the existing number of Representatives by the method known as the method of major fractions, which was the method used in the last preceding apportionment, and also by the method known as the method of equal proportions.

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HERBERT HOOVER.

THE WHITE HOUSE,
December 4, 1930.

Exhibit "B".

BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE

Apportionment of 435 Representatives by the method of major fractions, which was used in the last preceding apportionment, and by the method of equal proportions, with total population of the several States, number of Indians not taxed, and population basis of apportionment.

State	Population as enumerated Apr. 1, 1930	Indians not taxed	Population basis of apportionment	Apportionment of 435 Representatives by method of— Major fractions used in last preceding apportionment	Apportionment of 435 Representatives by method of— Equal proportions
Total	122,288,177	194,722	122,093,455	435	435
Alabama	2,646,248	6	2,646,242	9	9
Arizona	435,573	46,198	389,375	1	1
Arkansas	1,854,482	38	1,854,444	7	7
California	5,677,251	9,010	5,668,241	20	20
Colorado	1,035,791	942	1,034,849	4	4
Connecticut	1,606,903	6	1,606,897	6	6
Delaware	238,380	.....	238,380	1	1
Florida	1,468,211	20	1,468,191	5	5
Georgia	2,908,506	60	2,908,446	10	10
Idaho	445,032	3,496	441,536	2	2
Illinois	7,630,654	266	7,630,388	27	27
Indiana	3,238,503	23	3,238,480	12	12
Iowa	2,470,939	519	2,470,420	9	9
Kansas	1,880,999	1,501	1,879,498	7	7
Kentucky	2,614,589	14	2,614,575	9	9
Louisiana	2,101,593	.....	2,101,593	8	8
Maine	797,423	5	797,418	3	3
Maryland	1,631,526	4	1,631,522	6	6
Massachusetts	4,249,614	16	4,249,598	15	15
Michigan	4,842,325	273	4,842,052	17	17
Minnesota	2,563,953	12,370	2,551,583	9	9
Mississippi	2,009,821	1,667	2,008,154	7	7
Missouri	3,629,367	257	3,629,110	13	13
Montana	537,606	12,877	524,729	2	2
Nebraska	1,377,963	2,840	1,375,123	5	5
Nevada	91,058	4,668	86,390	1	1
New Hampshire	465,293	1	465,292	2	2
New Jersey	4,041,334	15	4,041,319	14	14
New Mexico	423,317	27,335	395,982	1	1
New York	12,588,066	99	12,587,967	45	45
North Carolina	3,170,276	3,002	3,167,274	11	11
North Dakota	680,845	7,505	673,340	2	2

Exhibit "B".

Ohio	6,646,697	64	6,646,633	24	24
Oklahoma	2,396,040	13,818	2,382,222	9	9
Oregon	953,786	3,407	950,379	3	3
Pennsylvania	9,631,350	51	9,631,299	34	34
Rhode Island	687,497	.....	687,497	2	2
South Carolina	1,738,765	5	1,738,760	6	6
South Dakota	692,849	19,844	673,005	2	2
Tennessee	2,616,556	59	2,616,497	9	9
Texas	5,824,715	114	5,824,601	21	21
Utah	507,847	2,106	505,741	2	2
Vermont	359,611	.....	359,611	1	1
Virginia	2,421,851	22	2,421,829	9	9
Washington	1,563,396	10,973	1,552,423	6	6
West Virginia	1,729,205	6	1,729,199	6	6
Wisconsin	2,939,006	7,285	2,931,721	10	10
Wyoming	225,565	1,935	223,630	1	1

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105

106 **Exhibit "C".**

HOUSE OF REPRESENTATIVES

CLERK'S OFFICE * * * WASHINGTON, D. C.

I, WM. TYLER PAGE, Clerk of the House of Representatives of the United States, hereby certify, pursuant to Section 22, Subdivision (B), of the Act of the Congress of the United States of America entitled "An Act to Provide for the Fifteenth and Subsequent Decennial Censuses and to Provide for Apportionment of Representatives in Congress", approved June 18, 1929, that the State of
107 New York shall be entitled, in the Seventy-third Congress and in each Congress thereafter until the taking effect of a reapportionment under said act or subsequent statute, to Forty-five Representatives in the House of Representatives of the Congress of the United States.

IN WITNESS WHEREOF I hereto affix my name and the seal of the House of Representatives of the United States of America this fourth day of March, anno domini 1931, in the City of Washington, District of Columbia.

108 (Signed) WM. TYLER PAGE
Clerk of the House of Representatives
of the United States.

(SEAL)

"House of Representatives
United States"

Exhibit "D".

STATE OF NEW YORK

IN SENATE

ALBANY, *April* 10, 1931

BY MR. CAMPBELL:

CONCURRENT RESOLUTION of the senate and assembly, constituting the legislature of the state of New York, subdividing the state of New York into forty-five congressional districts and defining the boundaries thereof.

The state of New York having become entitled to forty-five representatives in the house of representatives of the congress of the United States, pursuant to an act of congress approved June 18, 1929, entitled "An act to provide for the fifteenth and subsequent decennial censuses and to provide for the apportionment of representatives in congress," now therefore

RESOLVED (if the Assembly concur), That the representatives from such state in the house of representatives of the congress of the United States shall be chosen in the several congressional districts at the general election held therein in every even numbered year, that they shall be so chosen in the congressional districts as constituted by the legislature by this resolution, and not otherwise, except as the congressional districts, by action hereafter taken by the legislature, by bill or resolution, or action hereafter taken pursuant to the federal constitution, may be lawfully altered or otherwise consti-

112 *Exhibit "D".*

tuted, and that the legislature of such state by this resolution hereby subdivides such state into forty-five congressional districts, and hereby constitutes them as follows, with the following boundaries and descriptions:

First district. The counties of Suffolk and Richmond, as at present constituted, shall compose the first district.

Second district. The county of Nassau, as at present constituted, shall compose the second dis-
113 trict.

Third district. That part of the county of Queens, within and bounded by a line beginning at a point on a line dividing Nassau and Queens counties at Foch boulevard; thence along Foch boulevard to Two Hundred and Fourth street; thence along Two Hundred and Fourth street to Atlantic avenue; thence along Atlantic avenue to a line dividing Kings and Queens counties; thence along the said boundary line between Kings and Queens counties through Jamaica bay to Atlantic ocean and Rockaway inlet to the intersection of the
114 boundary line between Queens and Nassau counties; thence along the boundary line between Queens and Nassau counties to Foch boulevard to the point or place of beginning, shall compose the third district.

Fourth district. That part of the county of Queens, within and bounded by a line beginning at a point on a line dividing Kings and Queens counties at Atlantic avenue; thence along said boundary line between Kings and Queens counties to Park

lane; thence along Park lane to Woodhaven boulevard; thence along Woodhaven boulevard to Yellowstone boulevard; thence along Yellowstone boulevard to Sixty-ninth drive; thence along sixty-ninth drive to One Hundred and Thirtieth street; thence along One Hundred and Thirtieth street to Union turnpike; thence along Union turnpike to Hollis Court boulevard; thence along Hollis Court boulevard to Forty-sixth avenue; thence along Forty-sixth avenue to One Hundred and Forty-seventh street; thence along One Hundred and Forty-seventh street to Bayside avenue; thence 116
along Bayside avenue to Twenty-ninth avenue; thence along Twenty-ninth avenue to Bayside lane; thence along Bayside lane to Twenty-sixth avenue (formerly Poppenhausen avenue); thence along Twenty-sixth avenue to Bell boulevard; thence along Bell boulevard to Twenty-third avenue; thence along Twenty-third avenue prolonged to the waters of Little Neck bay; thence through the waters of Little Neck bay to the boundary line between Queens and Nassau counties; thence along the boundary line between Queens and Nassau counties to Foch boulevard; thence along Foch boulevard to Two Hundred and Fourth street; 117
thence along Two Hundred and Fourth street to Atlantic avenue; thence along Atlantic avenue to the boundary line between Queens and Kings counties to the point or place of beginning, shall compose the fourth district.

Fifth district. That part of the county of Queens, within and bounded by a line beginning at a point being the intersection of Little Neck bay where same is intersected by Twenty-third avenue prolonged; thence along Twenty-third avenue to Bell

boulevard; thence along Bell boulevard to Twenty-sixth avenue (formerly Poppenhausen avenue); thence along Twenty-sixth avenue to Bayside lane; thence along Bayside lane to Twenty-ninth avenue; thence along Twenty-ninth avenue to Bayside avenue; thence along Bayside avenue to One Hundred and Forty-seventh street; thence along One Hundred and Forty-seventh street to Forty-sixth avenue; thence along Forty-sixth avenue to Hollis Court boulevard; thence along Hollis Court boulevard to Union turnpike; thence along Union turnpike to One Hundred and Thirtieth street; thence
119 along One Hundred and Thirtieth street to Sixty-ninth drive; thence along Sixty-ninth drive to Yellowstone boulevard; thence along Yellowstone boulevard to Woodhaven boulevard; thence along Woodhaven boulevard to the Montauk division of the Long Island railroad; thence along the Montauk division of the Long Island railroad to Maurice avenue; thence along Maurice avenue to Calamus avenue; thence along Calamus avenue to Sixty-ninth street; thence along Sixty-ninth street to Woodside avenue; thence along Woodside avenue to Fifty-first street; thence along Fifty-first street to Thirtieth avenue; thence along Thirtieth
120 avenue to Forty-third street; thence along Forty third street as prolonged to Bowery bay; thence through the waters of Bowery bay, East river and Little Neck bay to Twenty-third avenue as prolonged to the point or place of beginning, shall compose the fifth district.

Sixth district. That part of the county of Queens, within and bounded by a line beginning at a point in the waters of Bowery bay where the same is interested by Forty-third street prolonged;

thence along Forty-third street to Thirtieth avenue; thence along Thirtieth avenue to Fifty-first street; thence along Fifty-first street to Woodside avenue; thence along Woodside avenue to Sixty-ninth street; thence along Sixty-ninth street to Calamus avenue; thence along Calamus avenue to Maurice avenue; thence along Maurice avenue to the Montauk division of the Long Island railroad; thence along the Montauk division of the Long Island railroad to Woodhaven boulevard; thence along Woodhaven boulevard to Park lane; thence along Park lane to the boundary line between Kings and Queens counties; thence along said boundary line between Kings and Queens counties and through the waters of Newtown creek, East river and Bowery bay to Forty-third street prolonged, to the point or place of beginning, shall compose the sixth district. 122

Seventh district. That part of the county of Kings, within and bounded by a line beginning at the junction of the East river and Newtown creek and thence through the waters of Newtown creek to the boundary lines of Kings and Queens counties, thence along said boundary lines, to Flushing avenue, to Broadway, to Lexington avenue, to Stuyvesant avenue, to Lafayette avenue, to Nostrand avenue, to Lee avenue, to Division avenue, to East river, thence along the East river, to Newtown creek, to point of beginning, shall compose the seventh district. 123

Eighth district. That part of the county of Kings, within and bounded by a line beginning at the intersection of the boundary line of Kings and Queens counties and Flushing avenue at Cypress avenue, running thence along said boundary line of Kings

and Queens counties, to waters of Jamaica bay and through said waters of Jamaica bay to Pennsylvania avenue, to Blake avenue, to Williams avenue, to Fulton street, to Broadway, to Flushing avenue, and thence along Flushing avenue, to point of beginning, shall compose the eighth district.

Ninth district. That part of the county of Kings within and bounded by a line beginning at the intersection of Gravesend avenue and Foster avenue, thence running along Foster avenue to Coney Island avenue, to Avenue J, to Schenectady avenue, to
125 Clarendon road, to Ditmas avenue, to Rockaway avenue, to Linden boulevard, to Pennsylvania avenue, to the waters of Jamaica bay, to the boundary line of Kings and Queens counties, along said boundary line to a point east of Duck point marsh, thence southerly and westerly through the waters of Jamaica bay, Rockaway inlet, Atlantic ocean and Sheepshead bay to Shore boulevard, Neptune avenue, to Ocean parkway, to Avenue L, to Gravesend avenue, to the point of beginning, shall compose the ninth district.

Tenth district. That part of the county of Kings
126 within and bounded by a line beginning at the junction of Fort Hamilton parkway and Gravesend bay, thence along Fort Hamilton parkway, to Eighty-sixth street, to Twelfth avenue, to Forty-second street, to Thirteenth avenue, to Forty-first street to Fourteenth avenue, to Church avenue, to Coney Island Avenue, to Foster avenue, to Gravesend avenue, to Avenue L, to Ocean parkway, to Neptune avenue, to Shore boulevard, to the waters of Sheepshead bay, Atlantic ocean, Gravesend bay, to Fort Hamilton parkway, to the point of beginning, shall compose the tenth district.

Exhibit "D".

Eleventh district. That part of the county of Kings within and bounded by a line beginning at the junction of New York bay and Forty-second street, thence along Forty-second street to Fourth avenue, to Thirty-fifth street, to Fifth avenue, to Lincoln place, to Eighth avenue, to Second street, to Prospect park west, to Prospect park southwest, to Coney Island avenue, to Church avenue, to Fourteenth avenue, to Forty-first street, to Thirteenth avenue, to Forty-second street, to Twelfth avenue, to Eighty-sixth street, to Fort Hamilton parkway, to the waters of Gravesend bay and thence through the waters of Gravesend bay, the Narrows, New York bay, to Forty-second street, to point of beginning, shall compose the eleventh district.

Twelfth district. That part of the county of Kings within and bounded by a line beginning at the junction of East river and Wallabout channel, and thence through the waters of Wallabout channel, to Division avenue, and thence along Division avenue, to Lee avenue, to Nostrand avenue, to Willoughby avenue, to Washington park or Cumberland street, to Dekalb avenue, to Ashland place, to Flatbush avenue, to Fifth avenue, to Thirty-fifth street, to Fourth avenue, to Forty-second street, to the waters of New York bay and thence through the waters of New York bay, Buttermilk channel, East river and Wallabout channel to point of beginning, shall compose the twelfth district.

Thirteenth district. That part of the county of Kings within and bounded by a line beginning at the intersection of Washington park or Cumberland street and Willoughby avenue, running thence along Willoughby avenue, to Nostrand avenue, to

Lafayette avenue, to Stuyvesant avenue, to Lexington avenue, to Broadway, to Saratoga avenue, to Chauncey street, to Fulton street, to Troy avenue, to Herkimer street, to New York avenue, to Atlantic avenue, to Classon avenue, to President street, to Franklin avenue, to Washington avenue, to Sterling street, to Rogers avenue, to Avenue D, to East Twenty-ninth street, to Farragut road, to East Thirty-eighth street, to Glenwood road, to East Thirty-ninth street, to Avenue J, to Coney Island avenue, to Prospect park southwest, to Prospect park west, to Second street, to Eighth avenue, to Lincoln palce, to Fifth avenue, to Flatbush avenue, to Ashland place, to Dekalb avenue, to Washington park or Cumberland street, to point of beginning, shall compose the thirteenth district.

Fourteenth district. That part of the county of Kings within and bounded by a line beginning at the intersection of Classon avenue and Atlantic avenue and thence along Atlantic avenue, to New York avenue, to Herkimer street, to Troy avenue, to Fulton street, to Chauncey street, to Saratoga avenue, to Broadway, to Fulton street, to Williams avenue, to Blake avenue, to Pennsylvania avenue, to Linden boulevard, to Rockaway avenue, to Ditmas avenue, to Clarendon road, to Schenectady avenue, to Avenue J, to East Thirty-ninth street, to Glenwood road, to East Thirty-eighth street, to Farragut road, to East Twenty-ninth street, to Avenue D. to Rogers avenue, to Sterling street, to Washington avenue, to Franklin avenue, to President street, to Classon avenue, to point of beginning, shall compose the fourteenth district.

Fifteenth district. That part of the county of New York within and bounded by a line beginning

at the Hudson river and West Sixty-third street, thence easterly along West Sixty-third street to Columbus avenue, along Columbus and Ninth avenues to West Fifty-seventh street, along West Fifty-seventh street to Eighth avenue, along Eighth avenue to West Thirty-seventh street, along West Thirty-seventh street to Seventh avenue, along Seventh avenue to Greenwich avenue, along Greenwich avenue to Sixth avenue, along Sixth avenue to West Third street, along West Third street to Great Jones street, along Great Jones street to East Third street, along East Third street to Second avenue, 134
along Second avenue to East Houston street, along East Houston street to Avenue D, along Avenue D to East Third street, along East Third street to East river, along East river and around the southerly end of Manhattan island, to the Hudson river and along the Hudson river to West Sixty-third street, the point or place of beginning, and Bedloe's Island, Governor's Island and Ellis Island, shall compose the fifteenth district.

Sixteenth district. That part of the county of New York within and bounded by a line beginning at the East river and East Third street, thence 135
westerly along East Third street to Avenue D, along Avenue D to East Houston street, along East Houston street to Second avenue, along Second Avenue to East Third street, along East Third street to the Bowery, along the Bowery and Fourth avenue to East Eighteenth street, along East Eighteenth street to Third avenue, along Third avenue to East Twenty-third street, along East Twenty-third street to Lexington avenue, along Lexington avenue to East Thirty-fourth street, along East Thirty-fourth street to Third avenue, along Third

avenue to East Fortieth street, along East Fortieth street to Lexington avenue, along Lexington avenue to East Fifty-ninth street, along East Fifty-ninth street to Third avenue, along Third avenue to East Seventy-third street, along East Seventy-third street to Lexington avenue, along Lexington avenue to East Ninety-sixth street, along East Ninety-sixth street to Park avenue, along Park avenue to East Ninety-ninth street, along East Ninety-ninth street to the East river, along the East river to East Third street, the point or place of beginning,
137 and all of Blackwell's Island (Welfare Island), shall compose the sixteenth district.

Seventeenth district. That part of the county of New York within and bounded by a line beginning at the Hudson river and West Sixty-third street, thence easterly along West Sixty-third street to Columbus avenue, along Columbus and Ninth avenues to West Fifty-seventh street, along West Fifty-seventh street to Eighth avenue, along Eighth avenue to West Thirty-seventh street, along West Thirty-seventh street to Seventh avenue, along Seventh avenue to Greenwich avenue, along
138 Greenwich avenue to Sixth avenue, along Sixth avenue to West Third street, along West Third street to Great Jones street; along Great Jones street to the Bowery, along the Bowery and Fourth avenue to East Eighteenth street, along East Eighteenth street to Third avenue, along Third avenue to East Twenty-third street, along East Twenty-third street to Lexington avenue, along Lexington avenue to East Thirty-fourth street, along East Thirty-fourth street to Third avenue, along Third avenue to East Fortieth street, along East Fortieth street to Lexington avenue, along Lexington ave-

nue to East Fifty-ninth street, along East Fifty-ninth street to Third avenue, along Third avenue to East Seventy-third street, along East Seventy-third street to Lexington avenue, along Lexington avenue to East Ninety-sixth street, along East Ninety-sixth street to Park avenue, along Park avenue to East Ninety-ninth street, along East Ninety-ninth street to Fifth avenue, along Fifth avenue to East Ninety-seventh street, thence across and through Central Park Transverse Road to West Ninety-seventh street, and Central Park West, along Central Park West to West Eighty-sixth street, along West Eighty-sixth street to Amsterdam avenue, along Amsterdam avenue to West Ninety-fifth street, along West Ninety-fifth street to the Hudson river and along the Hudson river to West Sixty-third street, the point or place of beginning, shall compose the seventeenth district.

Eighteenth district. That part of the county of New York within and bounded by a line beginning at the Hudson river and West One Hundred and Twenty-fifth street, thence running along easterly on West One Hundred and Twenty-fifth street, along West and East One Hundred and Twenty-fifth street to Park avenue, along Park avenue to East Ninety-ninth street, along East Ninety-ninth street to Fifth avenue, along Fifth avenue to East Ninety-seventh street, thence across and through Central Park Transverse Road to West Ninety-seventh street and Central Park West, along Central Park West to West Eighty-sixth street, along West Eighty-sixth street to Amsterdam avenue, along Amsterdam avenue to West Ninety-fifth street, along West Ninety-fifth street to the Hudson river, along the Hudson river to West One Hundred and

142 *Exhibit "D".*

Twenty-fifth street, the point or place of beginning, shall compose the eighteenth district.

Nineteenth district. That part of the county of New York within and bounded by a line beginning at the Hudson river and West One Hundred and Twenty-fifth street, thence running along easterly on West One Hundred and Twenty-fifth street to Seventh avenue, along Seventh avenue to West One Hundred and Thirty-sixth street, along West One Hundred and Thirty-sixth street to St. Nicholas
143 avenue, along St. Nicholas avenue to West One Hundred and Fifty-fifth street, along West One Hundred and Fifty-fifth street to Eighth avenue, along Eighth avenue to the Harlem river, along the Harlem river and Ship Canal to the boundary line between New York and Bronx counties, along said boundary line between New York and Bronx counties to the Hudson river, along the Hudson river to West One Hundred and Twenty-fifth street, the point or place of beginning, shall compose the nineteenth district.

Twentieth district. That part of the county of New York within and bounded by a line beginning
144 at East Ninety-ninth street, thence westerly along East Ninety-ninth street to Park avenue, along Park avenue to East One Hundred and Twenty-fifth street, along East and West One Hundred and Twenty-fifth street to Seventh avenue, along Seventh avenue to West One Hundred and Thirty-sixth street, along West One Hundred and Thirty sixth street to St. Nicholas avenue, along St. Nicholas avenue to West One Hundred and Fifty-fifth street, along West One Hundred and Fifty-fifth street to Eighth avenue, along Eighth avenue to the

Harlem river, along the Harlem river to Bronx Kills, to the East river, along the East river to East Ninety-ninth street, the point or place of beginning and Wards Island, Randalls Island and Sunken Meadow, shall compose the twentieth district.

Twenty-first district. That part of the county of Bronx, within the following boundaries: Beginning at the Harlem river and West Tremont avenue, thence along West Tremont avenue to East Tremont avenue, to Anthony avenue, to East One 146
Hundred and Seventy-sixth street, to East Tremont avenue, to Park avenue, to East One Hundred and Seventy-fifth street, to Washington avenue, to East One Hundred and Sixty-sixth street, to Third avenue, to East One Hundred and Sixty-third street, to Cauldwell avenue, to East One Hundred and Fifty-sixth street, to Saint Anns avenue, to East One Hundred and Forty-first street, to Brook avenue, to East One Hundred and Thirty-second street, to Lincoln avenue, to the Harlem river, thence along the Harlem river to West Tremont avenue, the point or place of beginning, shall compose the twenty-first district. 147

Twenty-second district. That part of the county of Bronx, within the following boundaries: Beginning at the intersection of Washington avenue and East One Hundred and Seventy-fifth street, thence along East One Hundred and Seventy-fifth street to Arthur avenue, to Crotona Park North, to East One Hundred and Seventy-fifth street, to Boston road, to Hoe avenue, to East One Hundred and Seventy-fourth street, to the Bronx river, thence along the Bronx river to the East river, to the Bronx

148 *Exhibit "D".*

Kills, to the Harlem river, to Lincoln avenue, to East One Hundred and Thirty-second street, to Brook avenue, to East One Hundred and Forty-first street, to Saint Anns avenue, to East One Hundred and Fifty-sixth street, to Cauldwell avenue, to East One Hundred and Sixty-third street, to Third avenue, to East One Hundred and Sixty-third street, to Washington avenue, thence along Washington avenue to East One Hundred and Seventy-fifth street, the point or place of beginning, and the North Brother Island, South Brother Island and Riker's Island, shall compose the twenty-
149 second district.

Twenty-third district. That part of the county of Bronx, within the following boundaries: Beginning at the Hudson river and the northerly boundary line of the city of New York, thence easterly along the said northerly boundary line of the city of New York to the Bronx river, to Fordham road, to Southern boulevard, to East One Hundred and Eightieth street, to Crotona avenue, to Crotona Park North, to Arthur avenue, to East One Hundred and Seventy-fifth street, to Park avenue, to East Tremont avenue, to East One Hundred and
150 Seventy-sixth street, to Anthony avenue, to East Tremont avenue, to West Tremont avenue, to the Harlem river, along the Harlem river to Spuyten Duyvil creek, through the waters of the Spuyten Duyvil creek to the Hudson river, along the boundary line of New York and Bronx counties, along the Hudson river to the northern boundary line of the city of New York, the point or place of beginning, shall compose the twenty-third district.

Twenty-fourth district. That part of the county of Bronx, within the following boundaries: Begin-

ning at the Bronx river and the northerly boundary line of the city of New York, thence easterly along the said northerly boundary line of the city of New York to the Long Island sound, to the East river, to the Bronx river, to East One Hundred and Seventy-fourth street, to Hoe avenue, to Boston road, to East One Hundred and Seventy-fifth street, to Crotona Park North, to Crotona avenue, to East One Hundred and Eightieth street, to Southern boulevard, to Fordham road, to the Bronx river, along the Bronx river to the northerly boundary line of the city of New York, the point or place of 152
beginning, and City island, Hunter island, Harts island, Twin island, High island, Middle Reef island, the Blauzes, and Chimney sweep, shall compose the twenty-fourth district.

Twenty-fifth district. That part of the county of Westchester, included in the town of Rye, city of White Plains, town of Scarsdale, town of Mamaroneck, town of Harrison, city of New Rochelle, town of Pelham, town of Eastchester and city of Mount Vernon, as at present constituted, shall compose the twenty-fifth district.

Twenty-sixth district. That part of the county of 153
Westchester, included in the town of Bedford, town of Cortlandt, town of Greenburg, town of Lewisboro, town of Mount Pleasant, town of New Castle, town of North Castle, town of North Salem, town of Ossining, town of Poundridge, town of Somers, city of Yonkers and town of Yorktown, as at present constituted, shall compose the twenty-sixth district.

Twenty-seventh district. The counties of Dutchess, Orange, Putnam, and Rockland, as at present

constituted, shall compose the twenty-seventh district.

Twenty-eighth district. The counties of Columbia, Green, Sullivan, Schoharie and Ulster, as at present constituted, shall compose the twenty-eighth district.

Twenty-ninth district. The county of Albany, as at present constituted, shall compose the twenty-ninth district.

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Thirtieth district. The counties of Rensselaer, Saratoga, Warren and Washington, as at present constituted, shall compose the thirtieth district.

Thirty-first district. The counties of Fulton, Hamilton, Montgomery and Schenectady, as at present constituted, shall compose the thirty-first district.

Thirty-second district. The counties of Clinton, Essex, Franklin and Saint Lawrence, as at present constituted, shall compose the thirty-second district.

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Thirty-third district. The counties of Jefferson, Lewis, Madison and Oswego, as at present constituted, shall compose the thirty-third district.

Thirty-fourth district. The counties of Herkimer and Oneida, as at present constituted, shall compose the thirty-fourth district.

Thirty-fifth district. The counties of Broome, Chenango, Delaware and Otsego, as at present constituted, shall compose the thirty-fifth district.

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Thirty-sixth district. The county of Onondaga, as at present constituted, shall compose the thirty-sixth district.

Thirty-seventh district. The counties of Cayuga, Cortland, Ontario, Seneca, Wayne and Yates, as at present constituted, shall compose the thirty-seventh district.

Thirty-eighth district. The counties of Chemung, Schuyler, Steuben, Tioga and Tompkins, as at present constituted, shall compose the thirty-eighth district. 158

Thirty-ninth district. That part of the county of Monroe, included within the boundaries of the fourth, sixth, seventh, eighth, twelfth, thirteenth, sixteenth, seventeenth, eighteenth, twenty-first and twenty-second wards of the city of Rochester, and the towns of Brighton, Henrietta, Irondequoit, Mendon, Penfield, Perinton, Pittsford, Rush and Webster, as at present constituted, shall compose the thirty-ninth district.

Fortieth district. That part of the county of Monroe, included within the boundaries of the first, second, third, fifth, ninth, tenth, eleventh, fourteenth, fifteenth, nineteenth, twentieth, twenty-third and twenty-fourth wards of the city of Rochester and the towns of Chili, Clarkson, Gates, Greece, Hamlin, Ogden, Parma, Riga, Sweden and Wheatland, as at present constituted, shall compose the fortieth district. 159

Forty-first district. The counties of Genessee, Livingston, Niagara, Orleans and Wyoming, as at

present constituted, shall compose the forty-first district.

Forty-second district. That part of the county of Erie, included within the boundaries of the towns of Grand Island, Tonawanda, the city of Tonawanda and that part of the eighteenth ward west of Main street, the nineteenth ward complete, that part of the twentieth ward west of Main street, the twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth and twenty-seventh wards of the city of Buffalo, as at
161 present constituted, shall compose the forty-second district.

Forty-third district. That part of the county of Erie included within the boundaries of the towns of Alden, Amherst, Aurora, Clarence, Colden, Concord, Elma, Holland, Lancaster, Marilla, Newstead, Sardinia and Wales, and the ninth, tenth, eleventh, twelfth, thirteenth fourteenth, fifteenth, sixteenth, seventeenth, and all that part of the eighteenth and twentieth wards lying east of Main street, of the city of Buffalo, as at present constituted, shall compose the forty-third district.

162 *Forty-fourth district.* That part of the county of Erie, included within the boundaries of the towns of Boston, Brant, Cheektowaga, Collins, East Hamburg, Eden, Evans, Hamburg, North Collins and West Seneca, the city of Lackawanna, and the first, second, third, fourth, fifth, sixth, seventh and eighth wards of the city of Buffalo, as at present constituted, shall compose the forty-fourth district.

Forty-fifth district. The counties of Allegany, Cattaraugus and Chautauqua, as at present constituted, shall compose the forty-fifth district.

Exhibit "D".

BE IT FURTHER RESOLVED, that the words "assembly district" when used in this resolution refers to assembly districts as at present constituted; and that whenever the word or words "town," "towns," "ward," "wards," "election district" or "election districts" is or are used in this resolution it or they shall be understood to refer to the town, towns, ward, wards, election district or election districts as constituted at the time of the adoption of this resolution.

BE IT FURTHER RESOLVED, that the respective boards of canvassers in the state of New York, beginning with the canvass of the results of the votes cast at the general election in the year 1932, in canvassing results of the votes cast for representatives in congress, pursuant to the election law as now or hereafter in force, shall canvass the results of the votes cast for such officers within the several congressional districts as constituted by this resolution, or as hereafter altered or constituted as set forth in this resolution, and not otherwise; also that a board of elections or officer charged by the election law, as now or hereafter in force, with the duty of certifying the results of the canvass of the vote cast for representative in congress, beginning with the vote cast at such general election, shall certify the vote so cast in a congressional district as the same is constituted by this resolution, or as hereafter altered or constituted as set forth in this resolution, and not otherwise; also that such board of elections or officer, in addition to certifying the result of such canvass in any such congressional district as required by the election law, shall certify the same to the house of representatives of the United States, and transmit the

166 *Exhibit "D".*

same to the clerk of the house of representatives at its first meeting; also that it shall be the duty of the secretary of state of the state of New York, or of the state officer or department succeeding generally to his powers and duties, to prepare a general certificate under the seal of the state and attested by him in his official capacity, addressed to the house of representatives of the United States, in that congress for which any person shall have been chosen, of the due election of all persons chosen at that election as representatives of this
167 state in congress who were so elected in the several congressional districts as constituted by this resolution, or as hereafter altered or constituted as set forth in this resolution, and not otherwise, and to transmit the same to the clerk of the house of representatives at its first meeting; and that the provisions of the election law, in so far as they are not inconsistent herewith, relating to the election of representatives from this state in congress, to fill vacancies by expiration of term or otherwise occurring or existing after the general election in the year 1932, shall continue in force until repealed, superseded or amended.

168 BE IT FURTHER RESOLVED, that the subdivision of the state of New York congressional districts as provided by this resolution shall be deemed to be in effect at such time prior to the general election of 1932 as shall be necessary for the purposes of nominating representatives in congress to be chosen in such districts at the general election in 1932, of nominating party candidates for the office of elector of president and vice-president of the United States to be chosen at such election, and of nominating and electing delegates and alternates to national party conventions in the year 1932.

Exhibit "D".

BE IT FURTHER RESOLVED, that the adoption of this resolution be certified by the presiding officer of each house of the legislature, and this resolution, with such certificate appended thereto, shall be deposited with the secretary of state of the state of New York.

BE IT FURTHER RESOLVED, that a copy of this resolution, including a copy of the certificate of its adoption, be certified by the respective clerks of the senate and assembly of the state of New York and be transmitted by them to the clerk of the house of representatives.

BY ORDER OF THE SENATE

A. MINER WELLMAN,
Clerk.

In Assembly, *April* 10th, 1931,
Concurred in without amendment,
By Order of the Assembly,
FRED W. HAMMOND, *Clerk.*

172 *Exhibit "D".*

STATE OF NEW YORK

April 10, 1931

IN SENATE

The foregoing resolution was duly passed, a majority of all the Senators elected voting in favor thereof.

By order of the Senate

173 HERBERT H. LEHMAN,
President.

STATE OF NEW YORK

April 10, 1931

IN ASSEMBLY

The foregoing resolution was duly passed, a majority of all the members elected to the Assembly voting in favor thereof.

174

By order of the Assembly

J. A. MCGINNIES,
Speaker.

Answer of Respondent. 175

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF ALBANY.

IN THE MATTER
of
The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Mandamus Order
against
EDWARD J. FLYNN, Secretary of State of the State of New York.

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Edward J. Flynn, Secretary of State of the State of New York, by John J. Bennett, Jr., Attorney General of the State of New York, answers to the petition herein as follows:

1. Denies each and every allegation contained in paragraphs "Third", "Seventh", "Twelfth", "Thirteenth" and "Sixteenth" of the petition herein except that the respondent, Secretary of State of the State of New York, admits 177

(a) as to paragraph "Third" of the petition that the Federal provisions as to Congressional Reapportionment are regulated by the Act of Congress of August 8th, 1911, and the Act of Congress of June 18th, 1929, which said Acts are now in full force and effect;

(b) as to paragraph "Seventh" of the petition that the so-called Concurrent Resolution

of the Senate and Assembly of the State of New York, annexed to the petition as "Exhibit D" was adopted in the form pleaded in the petition.

FOR A FIRST AND SEPARATE DEFENSE TO THE PETITION HEREIN.

2. Admits, upon information and belief, each and every allegation contained in paragraphs "First", "Second", "Fourth", "Fifth", "Sixth", "Eighth", "Ninth", "Tenth", "Eleventh", "Fourteenth", and "Fifteenth" of the petition herein and the said paragraphs are hereby repeated and made a part of this defense with the same force and effect as if herein fully set forth at length, and further

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(a) Referring to paragraph "Eleventh" of the petition, there is annexed hereto as "Exhibit 1", the opinion of the Attorney General of New York State, dated August 4, 1931, mentioned in said paragraph "Eleventh" of the petition but not therein set forth, and which said opinion is incorporated herein and made part hereof as if here set forth at length.

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3. That by Article 1, Section 4, of the Constitution of the United States it is provided:

"The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations except as to places chusing Senators."

4. Pursuant thereto and on the eighth day of August, 1911, the Congress of the United States

provided by law for the choosing of Representatives, more particularly by Section 3 thereof, as follows:

> "SEC. 3. That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which 182
> such State may be entitled in Congress, no district electing more than one Representative.";

and by Section 4 thereof, as follows:

> "SEC. 4. That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such state shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act; and if there be no 183
> change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed."

5. That on or about the thirtieth day of June, 1926, the Congress of the United States enacted a law effecting the codification and consolidation of the general and permanent laws of the United

184 *Answer of Respondent.*

States in force December 7th, 1925, in which said codification of the laws the provisions of the Act of August 8th, 1911, are substantially repeated in words as follows:

Section 3. "ELECTION BY DISTRICTS.—In each State entitled under this apportionment to more than one Representative, the Representatives to Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The
185 said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative."

Section 4. "ADDITIONAL REPRESENTATIVES AT LARGE.—In case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts prescribed by law on August 8, 1911, until such State shall be redistricted in the manner provided by the laws thereof and
186 in accordance with the rules enumerated in section 3; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts prescribed by law on August 8, 1911, until such State shall be redistricted as herein prescribed."

Copy of the Enacting Clause of said Statute, Chapter 713, 44 Stat. 773, is annexed hereto and marked "Exhibit 2" and made a part hereof as if herein fully set forth.

6. By Chapter 890 of the Laws of 1911, the Legislature of the State of New York duly enacted a general law redistricting the State of New York and dealing with future redistricting pursuant to future Congressional Reapportionments, which said Chapter has been amended by Chapter 340 of the Laws of 1915, Chapters 797 and 799 of the Laws of 1917, Chapters 34 and 250 of the Laws of 1918 and Chapter 636 of the Laws of 1922, but otherwise it has not been amended nor repealed, and it is now in full force and effect.

7. Under the Constitution of the State of New 188
York no law may be enacted except by bill, nor shall any bill be passed or become a law except with the assent of the majority of the members elected to the Senate and Assembly, and no bill shall be enacted into law until approved by the Governor or unless passed by the respective houses of the Legislature of the State of New York by a two-thirds vote after a veto by the Governor; that a Joint Resolution of the Senate and the Assembly may be adopted by the assent of the majority of a quorum of the members elected to each branch of the State Legislature; does not need the approval of the Governor as such and said Joint Resolution 189
without the approval of the Governor is wholly ineffective to amend or repeal a statute theretofore enacted into law.

8. On April 10th, 1931, the Senate and Assembly of the State of New York adopted a so-called Concurrent Resolution, copy of which is annexed to the petition herein and marked "Exhibit D", which said Concurrent Resolution was not submitted to the Governor of the State of New York for approval, nor was it approved by him.

190 *Answer of Respondent.*

9. The so-called Concurrent Resolution of April 10th, 1931, was and is wholly ineffective to amend or repeal Chapter 890 of the Laws of 1911 as amended, or any other law then (on April 10, 1931) operative in the State of New York.

FOR A SECOND SEPARATE DEFENSE.

10. Admits, upon information and belief, each and every allegation contained in paragraphs "First", "Second", "Fourth", "Fifth", "Sixth", "Eighth", "Ninth", "Tenth", "Eleventh", "Fourteenth", and "Fifteenth" of the petition herein and repeats each of said allegations herein, and also each and every allegation of the preceding "Separate Defense" contained in paragraph "2" to "9" inclusive and the same are made a part of this defense with the same force and effect as if herein fully set forth.

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11. The so-called Concurrent Resolution of April 10th, 1931, does not redistrict the State of New York into Congressional Districts containing equal or as nearly as practicable or as nearly as may be equal numbers of inhabitants, but on the contrary, the said proposed Districts are in many instances so grossly unequal that they do not give a reasonably equal, fair or just representation in Congress to the People of the State of New York, as more fully appears by the table of districts and population hereto annexed and marked "Exhibit 3" and made a part hereof as if herein fully set forth.

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12. The so-called Concurrent Resolution does not redistrict the State into districts composed of

contiguous and compact territory as required by law, but on the contrary, in many instances the proposed districts are grossly lacking in compactness and contiguity.

13. The so-called Concurrent Resolution does not accurately or completely describe boundaries or lines of certain district or districts in a manner enabling them to be ascertained with definiteness and certainty for the purpose of holding an election.

14. The so-called Concurrent Resolution is invalid and in violation of the Act of Congress of August 8th, 1911, and of the codified laws of the said Congress of the United States.

WHEREFORE, Respondent prays that the application herein be dismissed and for such other and further relief as to the Court may be just and proper.

JOHN J. BENNETT, JR.,
Attorney General, State of New York,
Attorney for EDWARD J. FLYNN,
Secretary of State.

196 *Answer of Respondent.*

STATE OF NEW YORK, }
COUNTY OF BRONX, } ss.:

EDWARD J. FLYNN, being duly sworn, says that he is the Respondent herein and that the foregoing Answer is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

EDWARD J. FLYNN.

197 Sworn to before me, this }
13 day of October, 1931. }

EDWARD C. JACKSON,
Notary Public.
Notary Public N. Y. Co. No. 7, Reg. No. 3-J-90
Cert. filed in Queens Co. No. 457, Reg. No. 7028
Cert. filed in Bronx Co. No. 15, Reg. No. 35-J-33
Cert. filed in Kings Co. No. 19, Reg. No. 3070
Certificate filed in Richmond County
Commission expires March 30, 1933
(Seal)

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Exhibit 1. 199

Aug. 4, 1931.

HONORABLE EDWARD J. FLYNN,
Secretary of State,
Albany, New York.

Re: *Congressional Reapportionment Resolution*

Dear Sir:

This will acknowledge receipt of your inquiry of June 30, 1931, in regard to the validity of the concurrent resolution of the Legislature under date of April 10, 1931. You state that since the passage 200
of that resolution a vacancy, due to death, has occurred in the Seventh Congressional District, in Kings County.

Your first inquiry is directed to the certification of the said vacancy in the Seventh Congressional District in Kings County along the lines existing prior to the passage of this resolution, or as set forth in the said resolution.

In answer to your said first inquiry, you are hereby advised that the said vacancy should be certified "along the lines which existed prior to the passage of this resolution," and not in accordance with the said concurrent resolution of April 201
10, 1931.

Your second inquiry asks whether or not the Secretary of State should certify to the Boards of Election the districts as set forth in the concurrent resolution for the prospective election of delegates to national conventions in the spring primaries.

In answer to your second inqtiiry, you are hereby advised that the certification to the Boards of Elec-

202 *Exhibit 1.*

tion of the districts for the proposed election of delegates to the national conventions should be in accordance with the said districts as in existence prior to the concurrent resolution, and that your procedure should be upon the theory that the said resolution of April 10, 1931, is ineffective.

After a careful consideration of the concurrent resolution and the history of legislative apportionment in this and other states, I have reached the conclusion that the said resolution of the Senate and the Assembly of this State of April 10, 1931,
203 is ineffectual to accomplish the purpose sought thereby, for the reason that a Congressional Reapportionment should be by legislative enactment and not by resolution; that said resolution does not have the effect of a legislative bill or law; and that the overwhelming weight of precedent is contrary to such procedure.

The reasons impelling me to these conclusions are set forth at greater length in the subjoined memorandum which I am making a part of this opinion.

1. *Reapportionment of Congressional districts should be by statute.*

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By the first clause of Section 2, Article I, of the Federal Constitution, it is provided:

> "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature;"

Exhibit 1.

and by the fourth clause:

> "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."

By Section 4 it is provided:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to Places of chusing Senators."

Although it is thus declared in Section 2 that "the people of the States" shall choose the members of Congress, and Congress took no action under Section 4 until 1842, most of the State legislatures in prescribing the times, places and manner of holding elections for representatives apportioned the State into districts and assigned to each a representative. In New York it was found necessary to place in the resolution ratifying the Federal Constitution what Chief Justice Fuller, in *McPherson* v. *Blacker,* 146 U. S. 1, later called a "salvo", in the form of a proviso that such ratification was upon condition that [subsequently amended to "in full confidence that"]

> "Congress will not make or alter any regulation in this State respecting the times, places and manner of holding elections for senators or representatives, unless the Legislature of this State shall neglect or refuse to

208 *Exhibit 1.*

make laws or regulations for the purpose; or from any circumstance be incapable of making the same; and that in such cases, such power will only be exercised until the Legislature of this State shall make provision in the premises."

Debates and Proceedings of the Poughkeepsie Convention, p. 141 (July 11, 1788).

In 1842, however, Congress provided that where
209 a State was entitled to more than one representative, the election should be by districts. (Act of June 25, 1842, 5 Stat. 491, ch. 47, carried forward as Section 23 of the Revised Statutes, repeated in substance in the subsequent apportionment acts until Act of August 8, 1911, ch. 5, 37 Stat. 14, and now Section 3 of the U. S. Code Annotated, title 2,) This provision read as follows:

"In each State entitled under this apportionment to more than one Representative, the Representatives in Congress shall be elected by districts composed of a contiguous and compact territory, and containing *as nearly as*
210 *practicable* an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative."

This enactment, the purpose of which was to provide uniformity and to avoid "an undue preponderance of power to the political party which had a majority of votes in the State, however small" (*Ex parte Yarbrough,* 110 U. S. 651, 660),

deprived the States of the right to regulate the "manner" in which Representatives should be elected, and likewise provided the "places", *i. e.*, districts, from which they should be elected. (Cf. Hogan, J., dissenting opinion, in *People ex rel. Fitzgerald* v. *Voorhis*, 222 N. Y. 494, at page 503). Then, by the Act of Feb. 2, 1872, ch. 11, § 3 (17 Stat. 28; R. S. § 25; March 3, 1875, ch. 130, § 6, 18 Stat. 400; U. S. Code, title 2, § 7), Congress abridged the power granted to the States to establish by law the "times" when elections for Congress should be held, fixing the same upon the 212
Tuesday next after the first Monday in November of every even numbered year.

That the power of Congress over the election of representatives, if and when exercised, is exclusive and complete, need hardly be argued. (*Ex parte Siebold*, 100 U. S. 371; *U. S.* v. *Gradwell*, 243 U. S. 476, 481.) It is true that in *Newberry* v. *United States*, 256 U. S. 232, the majority of the Supreme Court held that this power does not go so far back as to control party primaries for designating candidates for the Senate (and it may be ventured that this case is leaned upon heavily by the broad constructionists), yet Justice White, Pitney, Brandeis and Clarke were not convinced of this, and the case, 213
in any event, has nothing to do with the method by which districts shall be laid out, on which particular point the fact is that Congress has directed that it shall be done by *law*, and this has been held not to exceed the powers of Congress.

Such direction is not found specifically in the statute requiring the elections to be by districts, or in the recent legislation fixing the number of representatives to which each State is entitled. It is, however, expressly set forth in Section 4 of ch. 5

214 *Exhibit 1.*

of the Act of August 8, 1911 (37 Stat. 14; U. S. Code, title 2, § 4), which provides as follows:

> "In case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts *prescribed by law on* August 8, 1911, *until such State shall be redistricted in the manner provided by the laws thereof* and in accordance with the rules enumerated in section 3;
215 and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from *the districts prescribed by law on August 8, 1911,* until such State shall be redistricted as herein prescribed." (Emphasis mine.)

By the act of Congress dealing with apportionment which preceded the act of 1911 (Act of February 2, 1891, ch. 116; 26 Stat. 735), the provision was that Representatives, other than additional ones, should be elected "by the districts now prescribed by law until the Legislature of such State
216 in the manner herein prescribed shall redistrict such State", and if there was no increase the Representatives should be elected "from the districts now prescribed by law until such State be redistricted as herein prescribed by the Legislature of said State."

In *Davis* v. *Ohio,* 241 U. S. 565, the words "in the manner provided by the laws thereof", in the Act of 1911, were considered in a case involving a legislative act apportioning Congress districts, which act had been submitted to the people of the State, under a constitutional provision vesting the legisla-

tive power not only in the Senate and House of Representatives of the State but also in the people by way of referendum.

Holding that where the Constitution and laws of a State made the people, by means of a referendum, a part of the lawmaking power, the submission of a redistricting act to the people was valid and was within the power of Congress to permit, the United States Supreme Court said that the provision that the redistricting should be made by a State "in the manner provided by the laws thereof" had been substituted in the Act of 1911 for the previous provision that the existing districts should continue "until the Legislature of such State in the manner herein prescribed shall redistrict such State", for the express purpose of validating such submission to a referendum, where the Constitution and laws of a State called for the same. (Compare, however, *In re Opinion of the Justices,* 254 Mass. 617, 151 N. E. 680, holding that the State referendum was not applicable to a bill to establish Congress districts.) 218

The point that stands out in *Davis* v. *Ohio,* however, is that that case goes entirely upon the basis that redistricting is a legislative power, *to be accomplished only by a law, enacted as it is required that a law be enacted,* from which it follows that a concurrent resolution, which is not a law, would not suffice. 219

An impressive contrast, which may well be determinative, is afforded by the rule which governs in the ratification of an amendment to the Constitution and in the appointment of presidential electors.

In *Hawke* v. *Smith,* 253 U. S. 221, 231 (two cases), it was held that an amendment to the Fed-

220 *Exhibit 1.*

eral Constitution was not to be submitted to the people of Ohio, under the same provisions which had been held operative in regard to Congress districts in the case just cited, for the reason that the Federal Constitution gave the power of ratification to the Legislature alone, with no provision for participation therein by the people, the ratification of an amendment being *not an act of legislation,* which the process of redistricting undoubtedly was.

Of *Davis* v. *Ohio,* the court said (p. 230):

"That case dealt with Article I, § 4, of the
221 Constitution, which provides that the times, places and manners of holding elections for Senators and Representatives in each State shall be determined by the respective legislatures thereof, but that Congress may at any time make or alter such regulations, except as to the place for choosing Senators. As shown in the opinion in that case, Congress has itself recognized the referendum as part of the legislative authority of the State for the purpose stated. It was held, affirming the judgment of the Supreme Court of Ohio, that the referendum provision of the State constitution when
222 applied to a law redistricting the State with a view to representation in Congress was not unconstitutional. Article I, § 4, plainly gives authority to the State to legislate within the limitations therein named. *Such legislative action is entirely different from the requirement of the constitution as to the expression of assent or dissent to a proposed amendment to the Constitution.* In such expression no legislative action is authorized or required" (Italics mine).

So as to presidential electors, as is made clear in *McPherson* v. *Blacker*, 146 U. S. 1, the Legislature possesses plenary authority to direct the manner of their appointment, and might itself exercise the appointing power, by joint ballot or concurrence of the two houses, or by law, or by vote of the people, and if by vote of the people, by general ticket or by districts (p. 25).

This is so because it is provided in clause 2 of Section 1 of Article II of the Federal Constitution that "Each State shall appoint, in such manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress", and it is therefore the *State* which acts in this matter. "The Constitution recognizes that the people act through their representatives in the Legislature, and leaves it to the Legislature exclusively to define the method of effecting the object" (P. 27). 224

But there is no such plenary power in the Legislature as to Congress districts. Members of Congress are to be "chosen by the people of the several States" (Art. I, § 2), at times and places and in manner, not to be determined *by the State,* in which case the Legislature, on the analogy of the electors, might speak for all, *but as prescribed by the Legislature, subject to laws of Congress affecting the same, which laws lay down that the prescription shall be in statute form.* 225

2. *Concurrent Resolution has not the effect of law.*

In most of the States, including New York, a concurrent resolution, which ordinarily is not sub-

226 *Exhibit 1.*

mitted to the Executive for his approval, is not regarded as a law. "A concurrent resolution of the two houses is not a statute" (*People ex rel. Argus Co.* v. *Palmer,* 12 Misc. 392, affd. 146 N. Y. 406.)

The rule is different in the Federal Congress, where a resolution has the same status as a bill (U. S. Constitution, Art. I, § 7, subd. 3), and must, like a bill, be approved by the President or repassed over his veto to become effective. So Cushing (Law of Legislative Assemblies, § 2403) says:

227 "A form of legislation, which is in frequent use in this country chiefly for administrative purposes of a local or temporary character, sometimes for private purposes only, is variously known, in our legislative assemblies, as a joint resolution, a resolution, or a resolve. This form of legislation is recognized in most of our Constitutions, in which, and in the rules and orders of our legislative bodies, it is put upon the same footing, and made subject to the same regulations, with bills properly so called. In Congress, a joint resolution, which is the name given in that body to this kind of legislation, is there regarded as a bill."

228 Even so, and although it appears from *Olds* v. *Comr. of Land Office* (86 N. W. 936, affd. on rehearing 96 N. W. 508) that the Michigan Constitution recognized legislation by joint resolution, where the measure was limited to a single occasion and was not designed to become permanent law, and from *Linsly* v. *Hubbard,* 44 Conn. 109, that the Legislature of Connecticut could authorize, by mere resolution, the sale of lands in which certain parties held a contingent interest, and there may be

other States with similar provisions (see citations of counsel in *People ex rel. Burritt* v. *Comrs. State Contracts, Ill.*, 11 N. E. at p. 181) the great weight of authority in States with constitutional provisions similar to our own is that a joint or concurrent resolution, adopted by the Legislature, will not have the force or effect of a law where the Constitution, under which the legislative body operates, requires the enactment of all laws to be in some prescribed form other than by resolution.

It is true that Senate Rule 18 provides that "all resolution which propose any amendment of the 230
Constitution, or ratify any proposed amendment to the Constitution of the United States, shall be treated, in the form of proceedings on them, in a similar manner with bills," and that Assembly Rule 6 provides that "concurrent resolutions proposing amendments to the Constitution of the State and concurrent resolutions proposing or ratifying amendments to the Constitution of the United States shall, for all legislative purposes, be deemed to be and be treated as bills," and that there are various other provisions in the Rules for the handling of these and other concurrent resolutions in general legislative practice, and that Speaker Mac- 231
hold held that a concurrent resolution may provide that it shall be submitted to the Governor for his consideration and must be approved by him to become effective (Assembly Journal, 1923, p. 317); but this is a long way from making them statutes.

Section 16 of Article I of the Constitution provides that "the resolutions of the Congress of the said colony, and of the convention of the State of New York," in force on April 20, 1777, which have not since expired, or been repealed or altered,

"shall be and continue the law of this State." But from that point it parts company with resolutions as a means of making law. "No law shall be enacted except by bill." (Art. III, § 14.) All bills, and therefore all laws, must have an enacting clause, "The People of the State of New York, represented in Senate and Assembly, do enact as follows." (*Id.*) "Every bill which shall have passed the Senate and Assembly shall, before it becomes a law, be presented to the Governor" for his approval or disapproval, etc. (Art. IV, § 9.) Nothing of the kind
233 is essential in relation to a joint resolution. It has no enacting clause, and need not go to the Governor for any purpose. Such a resolution, if passed by the requisite vote and signed by the presiding officers, is in full force (Legislative Law, §§ 40-42), although it has been held, as stated above, that the Legislature may, if it wishes, make the effectiveness of a concurrent resolution dependent upon the Governor's approval.

As has been noted this distinction is drawn in most of the States, following Judge Cooley's expression of the principle (Const. Lim., 10th ed., p. 266):

234 "When the legislative power of a State is to be exercised by a department composed of two branches, or, as in most of the American States, of three branches, and these branches have their several duties marked out and prescribed by the law to which they owe their origin, and which provides for the exercise of their powers in certain modes and under certain forms, there are other questions to arise than those of the mere intent of the law-

makers, and sometimes forms become of the last importance; for in such case not only is it important that the will of the law-makers be clearly expressed, but is also essential that it be expressed in due form of law; since nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential."

236

Thus, in Illinois, it was held (*People ex rel. Burritt* v. *Comrs. State Contracts,* 11 N. E. 180) that an appropriation for printing and binding could not be made by a joint resolution which had no title and no enacting clause and lacked the signature and approval of the Executive. The measure was invalid on other grounds as well, but it was expressly decided that, though otherwise sound, that which the Constitution says can be done only by law cannot be accomplished by a document lacking the necessary form and essential prerequisites of a law. The Court did not withhold from a concurrent resolution a certain efficacy, but it said:

237

"While, in respect of many matters, the Legislature may speak by resolution, under our Constitution it is denied the power to enact laws except in the mode so carefully pointed out."

In *Mullan* v. *California,* 114 Cal. 578. L. R. A. 262, it was held that the Legislature could not by concurrent resolution confirm an appointment and

238 *Exhibit 1.*

authorize compensation, where the Constitution provided that the Legislature should have no power to authorize the payment of a claim against the State "under any agreement or contract made without express authority of law," and that "no law shall be passed except by bill."

Under the provisions of the Indiana Constitution that "No money shall be drawn from the Treasury but in pursuance of appropriations made by law," that all laws shall be enacted by bill, and that all bills must have an enacting clause and be approved
239 by the Governor to be effective, it was held (*May* v. *Rice,* 91 Ind. 546) that money could not be appropriated by joint resolution. The Court granted, however, that various functions might be fulfilled by such resolution "if such expression of the legislative will falls short of the enactment of a law."

To the same effect, see *Reynolds* v. *Blue,* 47 Ala. 711; *Collier, etc. Lith. Co.* v. *Henderson,* 18 Colo. 259, 32 Pac. 417; *State* v. *Platt,* 2 S. C. 150; *San Antonio* v. *Micklejohn,* 89 Tex. 79, 33 S. W. 735; *Cape Girardeau* v. *Fougeu,* 30 Mo. App. 551; *Barry* v. *Viall,* 12 R. I. 18; *Bovers* v. *Crane,* 1 W. Va. 176. In *State* v. *Kinney,* 56 Oh. St. 721, 47 N. E. 569, a
240 joint resolution submitting to the people the question of calling a constitutional convention was held void, not *per se,* but because of certain provisions therein which attempted to repeal or amend existing statute law. Perhaps the strongest language employed upon the subject is that of the Montana Supreme Court in *State ex rel. Peyton* v. *Cunningham,* 39 Mont. 197, 18 Ann. Cas. 705, in which the Court holding that a joint resolution of the Legislature in ordinary form, having no title or enacting clause and not being introduced by bill, though

approved by the Governor, is precluded from having the force and effect of a law by the provisions of the Montana Constitution that "no law shall be passed except by bill," that "the enacting clause of every law shall' be in a prescribed form, and that the subject of every law "shall be clearly expressed in its title," said:

> "If the Legislature may disregard these provisions, there is no other which it might not with equal propriety disregard, with the result that that branch of the government would act without limitation or restriction other than the 242
> whim or caprice of the majority. So the courts of all the States having constitutional provisions similar to them have refused to recognize mere resolutions adopted by the Legislature, whether joint or concurrent, or whether approved by the Executive or not, as having the force of law."

3. *The overwhelming precedent in this State indicates that Reapportionment should be by law.*

In the foregoing, I think there has been stated the general principle that a concurrent resolution 243
is not a law, and that there cannot be accomplished by a concurrent resolution what the Constitution requires shall be done by law, however fully and emphatically the proponents of that proposition may desire. Constitutional conventions made apportionments in 1821, 1846, and 1894, and there were legislative apportionments, *all by statute*, by L. 1802, ch. 79; L. 1808, ch. 90; L. 1815, ch. 142, ch. 208 (vetoed); L. 1822, ch. 209; L. 1826, ch. 289; L.

244 *Exhibit P.*

1836, ch. 436; L. 1846, ch. 94; L. 1857, ch. 339; L. 1866, ch. 805; L. 1879, ch. 208; L. 1892, ch. 397; L. 1906, ch. 431; L. 1907, ch. 727; L. 1916, ch. 373; L. 1917, ch. 798. *A reapportionment bill* was passed twice in both houses in 1926, but was vetoed.

In all this legislation nothing appears to indicate reluctance on the part of the Legislature to carry out its constitutional functions by means of statutory enactments. Lincoln's Constitutional History sheds no light upon the particular question. Examination of the Messages of the Governors, while it develops several vetoes, the action of Gov-
245 ernor Robinson in allowing the apportionment of 1879 to become a law without his approval (Messages, vol. VII, p. 401) and extremely bitter criticism of the Legislature by Governor Robinson and Governor Hill, fails, not unnaturally, to disclose any thought upon the part of the Executive that they might not be entitled to share in the task of apportionment. Governor Flower, indeed, in a message to the extraordinary session of 1892 (April 15; Messages, vol. IX, p. 155), refers to reapportionment as "now the duty of the law-making power," of which "law-making power" the Governor is, of course, a part, although he is no part of the
246 Legislature. Only Governor Hughes appears to have made a direct assertion on the subject, when he wrote to the extraordinary session of 1907 (Public Papers, July 8, 1907, p. 52):

> "It is not my purpose to propose a particular plan of apportionment. It is the function of the Legislature to formulate such plan and submit it by suitable bill for Executive action."

Apportionment Acts have been the subject of considerable litigation, particularly following the ap-

portionments of 1892, 1906 and 1916. In *People ex rel. Carter* v. *Rice,* 135 N. Y. 473, the validity of the 1892 Act was challenged on numerous constitutional grounds, among which was not raised the issue of an improper participation by the Governor. The Court held, five to two, that the constitutional provision vesting in the Legislature, the power to alter the Senate districts after each enumeration, grants a discretion which the Court has no jurisdiction to review, unless it appears that it has been plainly and grossly abused. Referring to this case in *Baird* v. *Kings County,* 138 N. Y. 95, 248
Judge Peckman, who wrote both opinions, said it was not intended in the *Rice* case to intimate "that in no case could the action of the Legislature be reviewed by the courts, but that cases might easily be imagined where the action of the Legislature" would exhibit a gross and intentional violation of the Constitution, and then the Court might interfere and restrain or prevent the abuse of legislative discretion.

As a matter of fact, this doctrine of the *Rice* case was overruled in *Sherrill* v. *O'Brien,* 188 N. Y. 185, reversing 144 App. Div. 890, where it was held that the right of review is expressly conferred by Article III, Section 5 of the Constitution, that the author- 249
ity of the Legislature in matters of apportionment is a delegated authority wholly derived from and dependent upon the Constitution, and that examination of the successive Constitutions shows an intentional and gradual withdrawal from the Legislature of discretionary power and a continued adding of limitations upon its powers in the matter of apportionment. This case held the Act of 1906 unconstitutional.

250 *Exhibit 1.*

The Governor's powers in connection with apportionment were alluded to in *Matter of Reynolds*, 202 N. Y. 430, 444, in which an attack upon the apportionment of 1907 was defeated, the Court saying:

> "We think the suggestion that the Legislature at an extraordinary session would be under the domination of the Governor and thus be induced to pass an unfair statute, and that the constitutional provisions were intended to guard against such an evil is wholly fanciful.
251 Such a thought might occur to a recluse whose knowledge of the world is exclusively gathered from the books in his library, but would not be considered seriously by any one whose familiarity with government was acquired by participation in public affairs. The Governor would have no personal interest in an apportionment, and if he and the Legislature were in accord, he would have no reason for resorting to an extraordinary session. On the other hand, no one can imagine that any Governor could force a hostile Legislature to enact an apportionment bill unfair to the party of the legislative
252 majority either at a regular session or at an extraordinary session, unless possibly by the exercise of the veto power, which is equally great at either session."

The Apportionment Act of 1916 was likewise attacked in *Matter of Dowling*, 219 N. Y. 44, and the various principles involved, not including, however, the one with which the present inquiry is concerned, were carefully considered, the result being that part of the Act was held to be invalid and the whole was set aside.

253

Study of these and other cases indicates that the Court of Appeals, in common with the various Governors, has always taken it for granted that an apportionment is to be made by legislative act, that is to say, a statute. As to this, it may be said that the Court would not be likely to rule upon such a question unless the point were raised by litigants before it. But that every Legislature which has had the task of apportionment to perform has acted as if it held the same belief, *viz.*, that it must be accomplished by law, sets up a weight of authority that may well be dismaying.

254

Very truly yours,

JOHN J. BENNETT, JR.,
Attorney General.

255

256 **Exhibit 2.**

APPENDIX F.

An Act to Consolidated, Codify, and Set Forth General and Permanent Laws of the United States in Force December Seventh, One Thousand Nine Hundred and Twenty-five.

[C. 713, 44 Stat. 773.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the fifty titles hereinafter set forth are intended to embrace the laws of the United States, general and permanent in their na-
257 ture, in force on the 7th day of December, 1925, compiled into a single volume under the authority of Congress, and designated "The Code of the Laws of the United States of America."

SEC. 2. In all courts, tribunals, and public offices of the United States, at home or abroad, of the District of Columbia, and of each State, Territory, or insular possession of the United States—

(a) The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish prima facie the laws of the United States, general and permanent in their nature in force on the 7th day of December, 1925; but nothing in this Act
258 shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments.

(b) Copies of this Act printed at the Government Printing Office and bearing its imprint shall be conclusive evidence of the original of the Code in the custody of the Secretary of State.

(c) The Code may be cited as "U. S. C." (Vol. 1, p. 3, U. S. C.)

Exhibit 8.

1. Inhabitants of the State of New York to be divided into 45 Congressional Districts as provided in the Fifteenth Census of the United States, Act of Congress June 18th, 1929 12,588,066

Divided equally into 45 Congressional Districts, each District would average 279,734 inhabitants plus.

2. The number of inhabitants of the 45 Congressional Districts the boundaries of which are divided in the so-called Concurrent Resolution of April 10th, 1931, are as follows:

District	*Number of Inhabitants.*
1	319,401
2	303,053
3	268,403
4	226,997
5	276,116
6	307,613
7	305,689
8	288,266
9	202,633
10	383,612
11	241,969
12	263,1[illegible]
13	290,225
14	484,893
15	385,503
16	387,067
17	249,292
18	284,865
19	275,301
20	285,284
21	305,615

262 *Exhibit 3.*

22	332,454
23	308,111
24	319,078
25	259,940
26	261,007
27	309,588
28	202,519
29	211,933
30	261,771
31	235,586
32	217,300
33	216,456
34	262,769
35	269,560
36	291,606
37	242,562
38	237,230
39	217,163
40	206,718
41	288,916
42	230,607
43	267,957
44	270,949
45	236,880

263

264 3. The Fifteenth Census of the United States gives to the City of New York 6,930,447 inhabitants.

4. Twenty-two and one-half Representatives are apportioned to the City of New York by the said Concurrent Resolution.

5. Twenty-two and one-half Representatives are likewise apportioned by the said Concurrent Resolution to the territory outside of the City of New

Exhibit 3. 265

York, representing 5,657,620 inhabitants as given by the Fifteenth Census of the United States.

6. The County of New York, Borough of Manhattan, City of New York, by the Fifteenth Census is given 1,867,312 inhabitants. Divided into six districts this would give to each District as an equal unit 311,218 inhabitants plus. The so-called Concurrent Resolution divides the said New York County, Borough of Manhattan, into six Districts as follows:

District.	*Number of Inhabitants.*	266
15	385,503	
16	387,067	
17	249,292	
18	284,865	
19	275,301	
20	285,284	

A fair and equal division of New York County in accordance with the State ratio of 279,734 inhabitants per unit of the 45 Congressional Districts would give six Districts to New York County with a surplus of 188,908 inhabitants available for combination with the part of Bronx County next adjoining New York County. 267

7. The Fifteenth Census of the United States gave to the County of Bronx 1,265,258 inhabitants. A fair apportionment would give to each District of the four assigned by the Concurrent Resolution to Bronx County 279,734 inhabitants, leaving a surplus of 146,320 in Bronx County, which, added to the surplus of 188,908 in New York County, would furnish a compact, contiguous District between the two counties as heretofore in existence

268 *Exhibit 3.*

and would furnish a fair and just division of the inhabitants of the counties. The so-called Concurrent Resolution divides Bronx County into four Districts as follows:

District.	*Number of Inhabitants.*
21	305,615
22	332,454
23	308,111
24	319,078

8. The Fifteenth Census of the United States
269 assigns to Kings County 2,560,401 inhabitants. A fair, equal and just division would apportion nine full Districts to Kings County of 284,489 inhabitants each. Kings County is subject to subdivision by avenues, streets and blocks with little difficulty into compact, contiguous, nearly equal Districts. A fair and equal division of Kings County into eight Districts as apportioned by the Concurrent Resolution would give to each District 320,050 inhabitants plus. The said Concurrent Resolution divides Kings County into eight Districts as follows:

270 *District.*	*Number of Inhabitants.*
7	305,689
8	288,266
9	202,633
10	383,612
11	341,969
12	263,114
13	290,225
14	484,893

9. The so-called Concurrent Resolution creates as the First District Richmond and Suffolk Counties, which are neither contiguous nor compact.

Exhibit 3.

10. The descriptions and boundaries described in the said Concurrent Resolution of certain Districts are in many instances indefinite, uncertain, non-existent and impracticable for election purposes.

Maps which will be submitted to the Court and which are made by reference a part hereof will exemplify the foregoing inequalities and lack of compactness and contiguity and uncertainty of boundaries in the Districts apportioned by the said Concurrent Resolution.

274 **Opinion of Court.**

SUPREME COURT,

ALBANY COUNTY.

IN THE MATTER

of

The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Mandamus Order

275 against

EDWARD J. FLYNN, Secretary of State of the State of New York.

(Supreme Court, Albany County Special Term, October, 1931.)

(Justice Ellis J. Staley, presiding,)

APPEARANCES:

ABRAHAM S. GILBERT, Esq., and BENJAMIN L. FAIRCHILD, Esq., Attorneys for Petition-
276 ers.

JOHN J. BENNETT, JR., Esq., Attorney General, Attorney for Respondent (Henry Epstein, Esq., of Counsel).

JOHN GODFREY SAXE, Esq., Attorney for James A. Farley, Chairman of the Democratic State Committee, Respondent-Intervener (Robert F. Wagner and John J. O'Connor, Esqs., of Counsel).

MEMORANDUM.

STALEY, *J.*:

This application is made for a mandamus order directing the Secretary of State to certify in election notices that forty-five (45) representatives in the House of Representatives in the Seventy-third Congress are to be elected in the congressional districts as defined in a concurrent resolution of the Senate and Assembly of the State of New York. Section 4 of Article 1 of the Federal Constitution provides: 278

> "The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations except as to the place of choosing senators."

An act of congress approved June 18, 1929, provided for the fifteenth and subsequent decennial censuses and for an apportionment thereunder of representatives in congress among the several states. The effect of this census statute and the apportionment made thereunder was an increase in the number of representatives of the State of New York in the House of Representatives from forty-three (43) to forty-five (45). 279

On April 10, 1931, the Assembly and Senate composing the Legislature of the State of New York, passed a concurrent resolution subdividing the State into forty-five (45) congressional districts, and therein specified and fixed the boundaries of such districts.

280 *Opinion of Court.*

This resolution was not in the form of a bill or law. It was not submitted to the Governor of the State for his approval. Subsequent to its passage it was submitted for filing to the Secretary of State.

The Attorney General has rendered an opinion to the Secretary of State, advising him that such resolution is ineffective to accomplish a redistricting of the State into congressional districts, and for the purpose of this proceeding, it is conceded that the Secretary of State will refuse to follow this resolution in his certificate for the Election of 1932.

281 The substantial question involved is whether the Legislature of the State of New York has the power to divide the state into congressional districts by a concurrent resolution not submitted to the Governor of the State for his approval, or whether the Legislature was compelled to make such subdivision by an enactment of law subject to the approval of the Governor.

This question compels a consideration of the meaning of the term "Legislature" as used in Section 4 of Article I of the Federal Constitution, of the existence of any enactment by congress under its reserved power altering the constitutional regulation, and the extent of executive participation in
282 the law making power of the State of New York to validate legislative action therein.

> "The legislative power of this state shall be vested in the Senate and Assembly." (N. Y. Constitution, Article 3, Section 1.)

Every bill which shall have passed the Senate and Assembly shall before it becomes a law be approved and signed by the Governor, or upon executive disapproval, approved upon reconsideration by

two-thirds of the members elected to each house of the Legislature. Any bill not returned by the Governor within ten (10) days, unless return is prevented by adjournment, shall be a law in like manner as if he had signed it. (N. Y. Constitution, Article 4, Section 9.)

This latter section establishes the necessity of executive action of an affirmative or negative character to give the force and effect of law to enactments of the Legislature. It makes the Governor of the State an essential part of the law making process and power, and establishes the extent of executive participation. 284

After the census of 1910, the Thirteenth Census, the congress in accordance with its custom following every census, passed an act which apportioned the members of the House of Representatives among the several states. This act was approved August 11, 1911, and is referred to as the 1911 Apportionment Act. In addition to the numerical apportionment among the states of the members of the House of Representatives, it contained provision for representatives in certain territories upon their admission as states before apportionment under the next decennial census; it provided that the districts in each state entitled to more than one representative shall be composed of a continguous and compact territory and contain as nearly as practicable an equal number of inhabitants; that in case of increase in the number of representatives in any state, that such additional representatives shall be elected by the state at large, and the others from the existing districts, "until such state shall be redistricted in the manner provided by the laws thereunder", and if no change in number from 285

the existing districts, "until such state shall be redistricted as herein prescribed."

The case of Davis vs. Hilderbrant, 241 U. S. 565, involved these provisions of the 1911 Apportionment Act in relation to provisions of the Constitution of the State of Ohio granting the right of referendum as a part of the legislative authority of that state. This case held that a redistricting act of Ohio for the purpose of congressional elections was properly submitted for validity to the referendum test, when such was duly invoked, because
287 the enactment of congress requiring that the redistricting should be made by a state, "in the manner provided by the laws thereof" compels such procedure.

Whatever the inference of this decision may be, it sustained the power of congress to so deal with congressional elections. It did not define or establish the method of the exercise of the legislative power of that state to regulate congressional elections under the Federal Constitution in the absence of such congressional enactment, but accepted the act as sufficient justification for referendum submission.

288 Respondents herein contend that the Davis case is controlling here, for the reason that the provisions of the 1911 Apportionment Act are still in effect; that they have not been repealed expressly or by implication and that their requirement "in the manner provided by law" is fatal to the method of action by the New York State Legislature reviewed in this proceeding.

With that contention I am constrained to disagree. The act of 1911 was limited by its title to one for the apportionment of representatives "un-

der the Thirteenth Census." Its provisions are limited by express language to procedure required, "under this apportionment." It was a temporary enactment designed for a specific purpose which has been performed. Its life has expired. It has been superseded by the apportionment under the 1929 Act. Its provisions limited by its language to the apportionment under the Thirteenth Census has no force or application to an apportionment under the Fifteenth Census.

The debates in congress when the 1929 census and apportionment act was considered, in relation 290
to a proposed amendment thereto, which are urged by the Attorney General as a valued guide to justify judicial determination that the general provisions of the 1911 Act are still law, can not be accorded such force and effect. At best they are mere expressions of opinion of individual members, that the general provisions of the 1911 Act would still prevail after the enactment of the 1929 Act; a view which was rejected. Such expressions are not to be accepted by the courts as controlling or competent aids to establish as law a statute which has ceased to exist under its own limitations.

The inclusion of the general provisions of the 291
1911 Act in the Code of Laws of the United States adopted in 1926 (Code of the Laws of the U. S. Title 2) does not effect a re-enactment of those provisions.

Section 2 (a) of the act of congress under which the codification was made (Chapter 712, 44 Stat. 777) provides: "but nothing in this act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising

through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted, effect shall be given for all purposes whatsoever to such enactments."

Hence there exists no congressional regulation which alters the power of the Legislature of each state to prescribe in a proper and legal manner the times, places and manner for holding elections for representatives in congress.

The word "legislature" as used in Section 4 Article 1, and other sections of the Federal Constitution, has been the subject of judicial construction by State and Federal courts.

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In Minnesota vs. Holm,— Minnesota, , a recent case, it was construed as meaning the representative body which makes the laws of the state, not synonymous with the law making power of the state and not including constitutional participation by the Governor of that state. Upon this holding an act of the Legislature of Minnesota, vetoed by the Governor providing for congressional redistricting was declared valid.

In State vs. Polley, 26 S. D. 5, it was given a contrary construction and there held to include the whole constitutional law making power of the state and subject to the referendum vote of the people and not limited simply to the members who compose the Legislature. It was further held in this case that a state in its sovereign capacity possessed the power to regulate elections therein; that Section 4 of Article 1 of the Federal Constitution was not a grant but a recognition of that power, subject, however, to the reservation of a power of Congress to establish regulations in relation to

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congressional elections and to that extent circumscribing the legislative authority.

In Hawke vs. Smith, 253 U. S. 221, the term "legislature" as used in Article 5 of the Federal Constitution in respect to the ratification of amendments to the Constitution was held to mean, the deliberative representative bodies that make the laws of the people for the respective states, and that the ratification of a proposed amendment to the Federal Constitution by the legislature of a state is not an act of legislation but is the expression of the assent of the state to the proposed amendment. 296

The opinion of Mr. Justice Day referring to the meaning of "legislature" as used by the framers of the Constitution in requiring "ratification" of amendments, says:

> "That was not a term of uncertain meaning when incorporated in the Constitution. What it meant when adopted it still means for the purpose of interpretation. A legislature was then the representative body which make the laws of the people. The term is often used in the Constitution with this evident meaning."

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These expressions have been seized upon as justification for the exercise by legislatures of an independent power, unlimited by state constitutional requirements, to establish congressional districts, in the state. The decision in this case and the expression of the opinion may be regarded as the prompting genesis of the concurrent resolution herein involved. At least they are asserted as authority for its validity.

298 *Opinion of Court.*

It is significant that the opinion in this case in its reference to the portions of the Federal Constitution, where the term "legislature" is used with this evident meaning does not include Section 4 of Article 1 of the Constitution. That a view was entertained that a different meaning should be ascribed to the term as used in Section 4 Article 1 is plainly indicated by reference in this opinion to the case of Davis vs. Hilderbrant, in relation to which it said:

> "Article 1, Section 4 plainly gives authority
> 299 to the state to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the constitution as to the expression of assent or dissent to a proposed amendment to the constitution. In such expression no legislative action is authorized or required."

The recognition of the difference in the method of functioning by the legislature where it exercises or did exercise the power of choosing a United States Senator, of ratifying or rejecting a proposed amendment to the Federal Constitution, of being
300 bound by oath to support the Constitution of the United States and that of "prescribing" the districts in a state from which representatives in congress shall be elected, is I believe, the key to correct interpretation. The nature of the function delegated to the legislature for performance affects and determines the methods of its action.

Legislative action has been frequently designated in judicial opinions as "legislative authority", "legislative power" and "the law making power".

A clear distinction exists between action, which in the very nature of things, must be taken by votes of the members of the legislatiure, and action taken by legislative authority. In the latter case, there must be an exercise of the law making power and in this state, the Governor, as well as the members of the legislature, is an essential part of that power.

When the legislature is granted the power to prescribe, it means that the legislature will do so by the exercise of its legislative power and the exercise of that power to be effective must be in accord with all the law making essentials. 302

In the State of New York, the Governor is an essential factor in the process. Judge Cardozo in the recent case of Doyle vs. Hofstader, 257 N. Y. 244, said:

> "The legislature can initiate but without the action of the Governor it is powerless to complete. It is not the sole custodian of legislative power. The power is divided between the legislature and the Governor."

Until this year the settled practice of all the states, so far as research has been able to determine, has been uniform in the method of establishing congressional districts by law enacted in the manner required by the law making process of each state. 303 Such action for nearly a century and a half furnishes a practical construction of the method of performing this function of persuasive, if not controlling and conclusive weight. Common usage and practice indicating a particular interpretation of a constitution or statute is a great value in determining its real meaning.

"We do not readily overturn the settled practice of the years". (Story vs. Craig, 231 N. Y. 33.)

> "The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction are entitled to the greatest weight. * * * The
> 305 construction to which we have referred has prevailed too long and been too uniform to justify us in interpreting the language of the Constitution as conveying any other meaning than that heretofore ascribed, and it must be treated as decisive" (McPherson vs. Blacker, 146 U. S. at pages 27 and 36).

Two views completely divergent of the meaning of the term "legislature" as used in Section 4 Article 1 of the Federal Constitution are presented by the decisions of the Supreme Court of South Dakota and Minnesota. Such a difference of view by
306 high judicial authority opens the door for resort to the uniform practice which has prevailed since the Constitution was established as a guide and authority for decision.

The force of custom, practical construction and usage should not at this late day yield to judicial interpretation of a term, declared in relation to the performance of a public function, which must, in the very nature of things, be performed by the individual choice and views of the members of the public body to which it is committed, when at-

tempted to be applied to such body in the performance of a task which involves and reflects deliberate action by a state.

The construction of the requirement of the Constitutional provision in the method of congressional apportionment, as evidenced by the many laws of the states, so long practiced and acquiesced in, should not be upset and governmental processes thrown into confusion because the executive will not approve a congressional apportionment as enacted by the legislature or the legislature will not enact one which will receive executive approval.

Order may be entered denying the application for mandamus order, without costs. 308

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Stipulation as to Exhibits.

IT IS HEREBY STIPULATED that the several maps submitted to the Court at Special Term upon the argument of the motion for the mandamus order, may be omitted from the printed record on appeal herein.

IT IS FURTHER STIPULATED, however, that upon the argument of any appeal in any court, either party may produce said maps or any of them with the same force and effect as though photostatic copies thereof were contained in the record on appeal herein.

Dated, November 13, 1931.

ABRAHAM S. GILBERT and
BENJAMIN L. FAIRCHILD,
Attorneys for Petitioners-Appellants.

JOHN J. BENNETT, JR.,
Attorney General,
Attorney for Respondent, Edward J. Flynn, Secretary of State of the State of New York.

JOHN GODFREY SAXE,
Attorney for James A. Farley, Chairman of the Democratic State Committee, Intervenor-Respondent.

Stipulation Waiving Certification.

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the papers herein printed consist of true and correct copies of the notice of appeal, the order appealed from and of all the papers used upon the hearing of the motion upon which the order appealed from was made and of the whole thereof, now on file in the office of the Clerk of the County of Albany. Certification thereof pursuant to Section 616 of the Civil Practice Act is hereby waived.

Dated, November 13, 1931.

ABRAHAM S. GILBERT and
BENJAMIN L. FAIRCHILD,
Attorneys for Petitioners-Appellants.

JOHN J. BENNETT, JR.,
Attorney General,
Attorney for Respondent, Edward J. Flynn, Secretary of State of the State of New York.

JOHN GODFREY SAXE,
Attorney for James A. Farley, Chairman of the Democratic State Committee, Intervenor-Respondent.

Notice of Appeal to Court of Appeals.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF ALBANY.

IN THE MATTER

of

The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Mandamus Order,

Petitioners-Appellants,

against

EDWARD J. FLYNN, Secretary of State of the State of New York,

Respondent,

and

JAMES A. FARLEY, Chairman of the Democratic State Committee,

Intervenor-Respondent.

SIRS:

PLEASE TAKE NOTICE that the petitioners, Samuel S. Koenig, John J. Knewitz and William L. Ward, hereby appeal to the Court of Appeals from the order of the Appellate Division, Third Department, entered on the 31st day of December, 1931, finally determining this proceeding, affirming the order heretofore entered at Special Term, which denied the petitioners' application for a mandamus order against Edward J. Flynn, Secretary of State of the State of New York, as resettled by the order of the Appellate Division, Third Department, entered on

the 11th day of January, 1932, and from each and every part of said order, as well as from said resettled order, and from each and every part thereof.

Dated, New York, January 11, 1932.

Yours, &c.,

ABRAHAM S. GILBERT and
BENJAMIN L. FAIRCHILD,
Attorneys for Petitioners-Appellants,
Office & P. O. Address,
10 East 40th Street,
Borough of Manhattan,
City of New York.

To:

Hon. JOHN J. BENNETT, JR.,
Attorney General,
Attorney for Respondent,
Albany, N. Y.

JOHN GODFREY SAXE, Esq.,
Attorney for Intervenor-Respondent,
1 Cedar Street,
New York City.

CLERK OF THE COUNTY OF ALBANY,
Albany, N. Y.

322 **Order of Affirmance Appealed From.**

At a term of the Appellate Division of the Third Department, held at the County Court House in the City and County of Albany, commencing on the 17th day of November, 1931.

Present—Hon. CHARLES C. VAN KIRK,
Presiding Justice,
" HAROLD J. HINMAN,
" EDWARD C. WHITMYER,
" JAMES P. HILL,
" LEON C. RHODES,
Associate Justices.

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IN THE MATTER
of
The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD, for a Mandamus Order,
Petitioners-Appellants,

against

EDWARD J. FLYNN, Secretary of State of the State of New York,
Respondent,

324 and

JAMES A. FARLEY, Chairman of the Democratic State Committee,
Intervenor-Respondent.

Upon the order entered herein on the 31st day of December, 1931 and upon the consent of the parties herein, it is

ORDERED that the order heretofore made and entered herein on the 31st day of December, 1931, be resettled to read as follows:

Order of Affirmance Appealed From. 325

At a Term of the Appellate Division of the Third Department, held at the County Court House in the City and County of Albany, commencing on the 17th day of November, 1931.

Present—Hon. CHARLES C. VAN KIRK,
Presiding Justice.
" HAROLD J. HINMAN,
" EDWARD C. WHITMYER,
" JAMES P. HILL,
" LEON C. RHODES, 326
Associate Justices.

IN THE MATTER
OF
The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Mandamus Order,
Petitioners-Appellants,
against
EDWARD J. FLYNN, Secretary of State of the State of New York, 327
Respondent,
and
JAMES A. FARLEY, Chairman of the Democratic State Committee,
Intervenor-Respondent.

An appeal having been taken to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, by the petition-

328 *Order of Affirmance Appealed From.*

ers Samuel S. Koenig, John J. Knewitz and William L. Ward from an order made and entered herein by Hon. Ellis J. Staley, Justice of the Supreme Court, sitting at Special Term and filed in the office of the Clerk of the County of Albany on the 12th day of November, 1931, denying petitioners' application for a peremptory order of mandamus against the respondent, Edward J. Flynn, Secretary of State of the State of New York, and from each and every part of said order, and the said appeal having come regularly on to be heard at a term of this court on the 24th of November, 1931, and the Petitioners-
329 Appellants having appeared by Abraham S. Gilbert and Benjamin L. Fairchild, Esqs., and the Respondent, Secretary of State, having appeared by John J. Bennett, Jr., Attorney General (Henry Epstein, First Assistant Attorney General, of counsel), and the Respondent Intervenor, James A. Farley, having appeared by John Godfrey Saxe of counsel, and the said argument having been heard and due deliberation having been had thereon,

Now, on all the proceedings had herein, it is

"ORDERED, that the said order appealed from de-
330 nying the peremptory order of mandamus as a matter of law and not in the exercise of discretion, be and it hereby is unanimously affirmed as a matter of law and not in the exercise of discretion.

JOHN S. HERRICK,
Clerk.

SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

IN THE MATTER
of
The Application of SAMUEL S. KOENIG, *et al.*, for a Mandamus Order,
Petitioners-Appellants,
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against
EDWARD J. FLYNN, Secretary of State of the State of New York,
Respondent,
and
JAMES A. FARLEY, Chairman of the Democratic State Committee,
Intervenor-Respondent.

Argued, November Term, 1931;
Decided, November Term, 1931.

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Hon. CHARLES C. VAN KIRK,
Presiding Justice,
Hon. HAROLD J. HINMAN,
Hon. EDWARD C. WHITMYER,
Hon. JAMES P. HILL,
Hon. LEON C. RHODES,
Associate Justices.

334 *Opinion of Van Kirk, P. J.*

An Appeal from an Order made and filed in the Albany County Clerk's Office November 12th, denying petitioner's application for a mandamus order against the Secretary of State of this State:

ABRAHAM S. GILBERT, BENJAMIN L. FAIRCHILD, Room 2810, 10 East 40th St., New York, for Appellants.

Hon. JOHN J. BENNETT, JR., Attorney General, (HENRY EPSTEIN, of Counsel) for Respondent, Secretary of State.

335 JOHN GODFREY SAXE, 1 Cedar St., New York, (ROBERT F. WAGNER, JOHN J. O'CONNOR, of Counsel), for Intervenor, James A. Farley.

VAN KIRK, P. J.

The application to the special term was for a mandamus order directing the secretary of state to perform the duties imposed upon him by statute in respect to the election of representatives in Congress in the year 1932 under a reapportionment of congressional districts as fixed by a "concurrent resolution" of the Senate and Assembly of this
336 state. The special term entered an order denying the application. The appeal is from that order.

The concurrent resolution was not presented to the Governor. The mandamus order was sought on the ground that this resolution, without the Governor's approval, was a valid compliance with Article I, Section 4, of the Federal Constitution, which provides: "Control of congressional elections.—1. The Times, Places and Manner of holding Elections for Senator and Representatives, shall be prescribed in each State by the Legislature

thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators". The respondent contends that compliance can only be had by act of the law making power of the state. Thus the determining question in the case is the meaning of the word "legislature". We shall discuss this question by considering the case, first, in respect to the laws of the state; and, second, in respect to the federal constitution.

Our state constitution contains no provision in respect to redistricting for the election of representatives in Congress. 338 It does make definite provisions for redistricting for election of members of the state legislature. (Article III, Sections 4, 5.) The Legislature has in a long series of *statutes* provided for redistricting the state for election of Representatives. As occasion arose a separate act or bill has been passed and approved by the Governor.

The state constitution, Article III, Section 1, provides: "The legislative power of this state shall be vested in the Senate and Assembly." The Governor of the State is no part of the Senate and Assembly. He takes no part in the original framing 339 of a bill or resolution. He has no seat in either house and no right to debate therein. But he has a veto power (Constitution, Article IV, Section 9) as follows: "Every bill which shall have passed the Senate and Assembly shall, before it becomes a law, be presented to the Governor; if he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it shall have originated, which shall enter the objections at large on the journal, and proceed to reconsider it." This

passed by a two-thirds vote of each house, "it shall become a law notwithstanding the objections of the Governor". Thus the Legislature may enact a valid law despite the exercise of the veto power, but it is not the complete law making power. While the legislative department of the state is distinct from the executive department, the veto power is an express power conferred upon the executive and is a check upon the legislative power. (People v. Morton, 156 N. Y. 136, 144.) Thus, while the Governor is strictly no part of the Senate or Assembly, he is a part of the law making power. The two
341 above quoted sections of the Constitution must be read together. Both are operative. The Governor has power to act in respect to legislation. In reviewing an act passed by both houses, when presented to him, he has before him the questions of the constitutionality, the expediency of, and the necessity for the act. If he disapproves, he must state his objections thereto. Call his authority what we may he considers the bill as presumably the members and the senators had considered it. It was early held that he has a part in the enactment of laws, is "a participator in the function of making laws". (People v. Bowen, 21 N. Y. 517, 521.) This
342 view has prevailed to the last opinion of the Court of Appeals, where it was held that the Legislature is not the sole custodian of legislative power. "The power is divided between the Legislature and the Governor." (Matter of Doyle, 257 N. Y. 244, 261.)

In the State Constitution the "Legislature" is authorized to do many things which cannot be accomplished save by the functioning of the full legislative or law making power. Among other things the Legislature is given power to alter senatorial and assembly districts. (State Constitution, Arti-

cle III, Section 4.) This has uniformly been accomplished by statute, by act of the full legislative power, never by concurrent resolution." (See Matter of Reynolds, 202 N. Y. 430.) In like manner, until this year, this state has been redistricted for congressional elections by statute, the bill therefor having been presented to the Governor after it was passed by both houses. There can be no doubt then that, in the ~~State~~ Constitution, in the courts and in legislative acts, this state has used the word "Legislature" as meaning legislative, or lawmaking, power. As to the State, this seems conclusive. 344
(Davis v. Ohio, 241 U. S. 565, 567.)

We turn then to the Federal Constitution, Article I, Section 4, (*supra*) and to the federal courts, where we find a like construction. It is true there are a number of provisions in the Federal Constitution which delegate to the State Legislature duties which do not involve law making. Article I, Section 3, prior to the seventeenth amendment, provided that senators should be chosen in each state by the Legislature thereof. Choosing Senators by the Legislature required no apportionment or districting; it required no action by the law making power. We shall refer to this later. Article V provides for amendments to the Federal Constitution, 345
which amendments shall be valid when ratified by the Legislatures of three-fourths of the several states, or by conventions of three-fourths thereof. In Hawke v. Smith (253 U. S. 221, 226) it is said: "Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages, representative of the people, which it was assumed would voice the will of the people". And it was held that the adoption of an amendment did not require an act of the law making power. The

delegation to legislatures of the power to prescribe regulations for the election of Representatives in Congress is not mentioned in the opinion; nor is it held that, if a duty imposed upon the "Legislature" involves law making, the word "Legislature" would not mean the law making power. Redistricting for the election of representatives requires the enactment of a statute, as does redistricting for the election of State Senators and Assemblymen. This law making power is the natural and usual power to prescribe "times, places and manner of holding elections"; it is an appropriate power for making
347 an authoritative rule of action to be observed by officers and citizens of a state. We think the delegation of authority to prescribe regulations for elections of representatives in Congress is to the Legislature of the law making power. That this was the intent of the framers of the Constitution is further indicated by the fact that the power "by law to make or alter such regulations" was reserved in Congress. If alterations are to be made by law, why should not the regulations altered be so made?

Until recently this has been the construction of this section of the Federal Constitution by the states generally; elections have been conducted in
348 compliance with statutes enacted under this con-
0 struction and the validity of those elections has not been questioned. In the states redistricting for state elections has uniformly been accomplished by statute. Such general construction should have great weight, unless in violation of the plain mandates of the Constitution. (Gardner v. Ginther, 232 A. D. 296, 301, and cases cited). We find no plain mandate of the Constitution which has been violated by the practice which has been followed by the Federal Government and by the states for many

years. The elaborate and able arguments, supported by plentiful authorities, in this case, indicate that the meaning of this section is not entirely plain to all. If petitioners' contention is correct, some seven score years of erroneous practice passed before this alleged plain meaning was discovered.

We find support for our position in Davis v. Ohio (241 U. S. 565). When that case arose the Constitution of Ohio had been amended to provide that, after the enactment of a law by the Senate and House of Representatives and its approval by the Governor, upon petition, the question of whether 350
the law should become operative was to be submitted to a vote of the people and, if approved, the law should be operative. A bill redistricting the State for Congressional elections had been passed and approved by the Governor. A referendum was had and the statute was disapproved. A mandamus order was asked directing the state election officers to disregard the vote of the people on the referendum. The lower court held that the referendum was a part of the legislative power of the State and that nothing in the act of Congress of 1911, or in the constitutional provision, operated to the contrary. Therefore the disapproved law had no 351
existence and was not entitled to be enforced by mandates. On appeal to the United States Supreme Court the decree of the lower court upholding the referendum vote as part of the legislative power was affirmed. This was necessarily a holding that, in that case, the word "Legislature" in Article I, Section 4, meant the law making body of the State. In the opinion reference is made to the Federal act of August 8th, 1911 (37 Statute, 13), which provided that redistricting should be made by a state "in the manner provided by the laws thereof". This

introduces nothing in conflict with our view. The power to redistrict was delegated by the Constitution, not by Congress. The act of 1911 was an act of Congress. An act of Congress could in no wise change the Constitution. That which the Constitution meant when it was adopted it still meant when Congress passed the act of 1911. Thus, when Congress passed this act, it but declared its understanding of this section of the Constitution to be that the power to redistrict was delegated to the Legislature as the law making power. Unless that is the
353 true construction, the act of 1911 would be unconstitutional. So, as we understand, the United States Supreme Court held in Hawke v. Smith (*supra*, page 230), where the opinion in the Davis case is construed as follows: "It dealt with Article I, Section 4, of the Constitution, which provides that the times, places and manners of holding elections for Senators and Representatives in each state shall be determined by the respective legislatures thereof, but that Congress may at any time make or alter such regulations, except as to the place of choosing Senators. As shown in the opinion in that case, Congress had itself recognized the referendum as part of the legislative authority of the State for
354 the purpose stated. It was held, affirming the judgment of the Supreme Court of Ohio, that the referendum provision of the state constitution when applied to a law redistricting the State with a view to representation in Congress was not unconstitutional. Article I, Section 4, plainly gives authority to the State to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the constitution. In such ex-

pression no legislative action is authorized or required." It seems to us that these two cases hold very plainly that the word "Legislature" in Article I, Section 4, means, where legislative action "is authorized or required," the law making power.

We have not overlooked the argument that, since Article I, Section 4, of the Federal Constitution uses the same language in respect to elections for Senators and Representatives and since the election of Federal Senators is conceded, formerly, to have been by the votes of the members of the two houses only, the redistricting must be made by the two houses only; that is, the word "Legislature" 356
must have the same meaning in one case as in the other. We cannot consent. The distinction is stated in Hawke v. Smith, *supra*. Also there are the other sections in Article I of the Federal Constitution. Section 3, Sub. 1, before the seventeenth amendment was adopted, provided that Senators shall be chosen by the Legislature. In the choosing of Senators then, the members of the Legislature were required in some form to vote. The majority of the votes determined the successful candidate. A Governor was not a member of a state Senate or Assembly. He had not a right to vote. Neither could he defeat the choice of the majority by a vote. It 357
could not have been intended that a Governor, a member of one party, could defeat by veto the election of a candidate of another party, which had a majority, but not a two-thirds majority, in the two houses. Evidently no action by the law making body as such was intended. Section 2, Sub. 1, provides that representatives be chosen "by the people of the several states". Sub. 3 of this section provides for the enumeration of the voters in each state for the apportionment of members to each state.

Then (Section 4) follows the delegation of power to prescribe the "times, places and manner" of holding elections. This is a power quite different from the power to choose a Senator. This delegated power to prescribe regulations is also a mandate. It involves a redistricting of the state. This is to be made by a state in the manner prescribed by the laws thereof, not by votes of the individual members. It is an act of the law making power.

The ultimate regulation of the "times, places and manner" of holding elections for Representatives is in the Federal Congress. The Federal Constitution
359 has delegated this power to regulate to the State Legislatures, but has reserved in Congress the power to "make or alter such regulations". State laws prevail unless altered by Congress. (In re Coy, 127 U. S. 731, 752.) In no respect, material in our view of this case, has Congress altered any law of, or practice in, this State in respect to the election of Representatives in Congress.

We conclude that Article I, Section 4, of the Federal Constitution delegates to the State Legislature authority to take such action as is customary and necessary under the law of the State to make effective its mandate; that, where the action involves
360 the law making power, that power is to be exercised; prescribing in each State the times, places and manner of holding elections for representatives involves the law making power of the State; the law making power in this State is the Legislature (Senate and Assembly) and the Governor; the mandate in this case was to the law making power.

Believing that we are right in this conclusion, we do not find it necessary to consider the many other points urged in the briefs.

The order should be affirmed.

Opinion of Hill, J. (Concurring). 361

SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

IN THE MATTER

of

The Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM WARD, for a Mandamus Order,

Petitioners-Appellants, 362

against

EDWARD J. FLYNN, Secretary of State of the State of New York,

Respondent,

and

JAMES A. FARLEY, Chairman of the Democratic State Committee,

Intervenor-Respondent.

HILL, J. (Concurring):

The government of the Union is supreme within its sphere of action. (M'Culloch v. Maryland, 4 Wheat, .316). First in importance within that sphere is the selection of the persons who are to perform governmental duties. The untrammeled right to select rulers and officials is the primary prerequisite of every free people and nation. No State in the Union holds a suzerainty as to the selection of national legislators or other officials. Such powers as any state of its officials may exer- 363

cise have been delegated by the constitution or by the Congress under the Constitution. The constitution speaks with greater definiteness as to this than as to other matters of less relative importance. "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous branch of the State Legislature". (Section 2, Article 1.) The provision as to the Senate, prior to the seventeenth amendment,
865 was equally definite. "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six Years;". (Section 3, Article 1.) After definitely fixing the qualifications of electors who may vote for the members of each branch of the Congress, the constitution, by a procedural section (Section 4, Article 1) provides concerning the opportunity to be given for voting and the machinery of the elections. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the
866 Places of chusing Senators." The state legislatures were empowered by this delegation of authority to prescribe regulations for the election of representatives. Legislatures prescribe regulations of conduct by enacting laws. Laws enacted by the legislature of this state are submitted to the Governor for his approval.

This delegated power may be taken away at any time, for "the Congress may at any time by Law

make or alter such Regulations, except as to the Places of chusing Senators". The Federal Act of 1911 by its terms was limited to the apportionment following the thirteenth census. The apportionment here involved is the one following the fifteenth census. The Federal Act of 1929 contains no regulations as to redistricting. There being no Federal statute which applies, the legislature as a law making body, has full authority under the power delegated to it by this section, to prescribe regulations in respect of "The Times, Places and Manner of holding Elections for * * * Representatives". This includes redistricting. The law which the legislature enacts will continue in full force until such time as "Congress may * * * by Law" modify it, or "by Law" make new regulations.

Each provision of the Election Law of this state which applies to the election of representatives in Congress has been passed under the authority delegated to the legislature as a law making body by this provision of the constitution. Section 298 of the Election Law fixes the time and place "of holding Elections for * * * Representatives". The Governor participated in the enactment of that section. If redistricting, which also has to do with the "Places and Manner of holding Elections for * * * Representatives" is to be accomplished by concurrent resolution, then with equal force may it be argued that the above section of the Election Law should have been promulgated by means of a concurrent resolution. Likewise each provision of the Election Law, the Primary Election Law and the Corrupt Practices Act which pertains to the selection of representatives in Congress should have

been the subject of concurrent resolution, for the only power of the law making body of this state in respect of the election of representatives in Congress is that delegated by this section of the Federal Constitution.

It is argued that "legislature" as used in this section, is conceded to have the meaning contended for by the appellants, in so far as it applies to the election of Senators. If this were a fact, it would be a persuasive argument. Chief Judge Marshall, construing the meaning to be given "commerce" in
871 the constitutional provision as to the power of Congress "To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes" said "If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain, intelligible cause which alters it" (Gibbons v. Ogden, 9 Wheat. 1, 194): But I fail to see any foundation for the argument. Section 3, Article 1 provides that senators be "chosen by the legislature" thus describing collectively the persons who should vote, while in Section 4, Article 1, "legislature" is used both as to senators and
872 representatives as defining a law making body that should prescribe regulations concerning "The Times, Places and Manner of" their election. And, if the "law making" legislature (Section 4, Article 1) failed in any or all particulars to prescribe regulations by law as to the "Times, Places and Manner" of holding elections for senators, then the "voting" legislature (Section 3, Article 1) might adopt rules for their own orderly conduct and guidance as voters.

There has been a practical construction of this section, not only each time that the several states have been redistricted for decades, but also each time that the law making power in a state has enacted a provision of the Election Law which applies in whole or in part to the "Times, Places and Manner of holding Elections for * * * Representatives". If a doubt existed as to the meaning of the provision, a practice so long settled and established should be followed (The Pocket Veto Case, 279 U. S. 655, 688).

I concur for affirmance. 374

375

876 **Stipulation Pursuant to Section 170 of the Civil Practice Act.**

IT IS HEREBY STIPULATED that the foregoing are true copies of the record of the Appellate Division of the Supreme Court, Third Department, of the order appealed from, the opinions of the Appellate Division, the notice of appeal, all of which are on file in the office of the Clerk of the County of Albany. Certification thereof pursuant to Section 616 of the Civil Practice Act is hereby waived.

Dated, New York, January 12th, 1932.

877 ABRAHAM S. GILBERT and
BENJAMIN L. FAIRCHILD,
Attorneys for Petitioners-Appellants.

JOHN J. BENNETT, JR.,
Attorney General,
Attorney for Respondent.

JOHN GODFREY SAXE,
Attorney for Intervenor-Respondent.

878

STATE OF NEW YORK,
Court of Appeals,
State Reporter's Office, ss:

I, Louis J. Rezzemini, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of In the Matter of Samuel S. Koenig et al., Appellants, against Edward J. Flynn, as Secretary of State, et al., Respondents, decided by the Court of Appeals on the 9th day of February, 1932, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 23rd day of February, 1932.

Louis J. Rezzemini, as Reporter of the Court of Appeals of the State of New York. (Seal Court of of Appeals of the State of New York.

Attest: Wm. J. Armstrong, Clerk of the Court of Appeals. (L. S.)

STATE OF NEW YORK,
Court of Appeals:

I, Benjamin N. Cardozo, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that William J. Armstrong is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that Louis J. Rezzemini is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of In the Matter of Samuel S. Koenig et al., Appellants, against Edward J. Flynn, as Secretary of State, et al., Respondents, decided by the said Court of Appeals on the 9th day of February, 1932, is in due form and sufficient under the laws of the State of New York

and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of William J. Armstrong, as clerk of said court, appended thereto is the true and genuine signature of said William J. Armstrong, and the signature of Louis J. Rezzemini, as reporter of said court, appended thereto is the true and genuine signature of said Louis J. Rezzemini.

In witness whereof I have hereunto subscribed my official signature at the Chambers of said court at the Court of Appeals Hall in the City of Albany and State of New York on the 23rd day of February in the year one thousand nine hundred and thirty-two.

Benjamin N. Cardozo, as Chief Judge of the Court of Appeals of the State of New York.

In the Matter of the Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD for a Mandamus Order, Appellants, v. EDWARD J. FLYNN, Secretary of State of the State of New York, Respondent, and JAMES A. FARLEY, Chairman of the Democratic State Committee, Intervener-Respondent.

Decided February 9, 1932

Appeal from an order of the Appellate Division, third department, affirming an order of the Special Term denying an application for a mandamus order.

Abraham S. Gilbert and Benjamin L. Fairchild for appellants.

John J. Bennett, Jr., Attorney-General, for respondent.

John Godfrey Saxe for the intervener-respondent.

CRANE, J.:

Following the census of 1910, Congress enacted the Thirteenth Apportionment Act, in August of 1911 (Vol. 37, U. S. Statutes at Large, chap. 5, p. 13). It reads in part as follows:

"That after the third day of March, nineteen hundred and thirteen, the House of Representatives shall be composed of four hundred and thirty-three Members, to be apportioned among the several States as follows: * * * New York, forty-three.

"Sec. 3. That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress, shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

"Sec. 4. That in case of an increase in the number of representatives in any State under this apportionment, such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed."

Thereafter, and in accordance with this act of Congress, New York State passed an act known as chapter 890 of the Laws of 1911, which became a law on October 18, 1911, with the approval of the Governor. It read: "For the election of representatives in congress of the United States, this state shall be and is hereby divided into forty-three districts, namely—" The districts were then described, and it wound up by stating that all acts inconsistent with this law were repealed.

Thus the matter stood. Representatives were elected in this State from the congressional districts described in this State law of 1911, up to and until the present time. Another census was taken, pursuant to an act of Congress, passed June 18, 1929. This act not only provided for the taking of the census, but also provided for the increase or decrease in State representation according to the results of the census. The total number of Representatives was not to be increased. (46 U. S. Stat. at Large, chap. 28, June 18, 1929.) That part of the act providing for the apportionment of Representatives is also to be found in Mason's Code (Vol. 5, No. 3, October, 1929, p. 20). Section 22(a) reads as follows:

"On the first day, or within one week thereafter, of the second regular session of the Seventy-first Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the fifteenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives made in each of the following manners: [the rule is then stated]
* * *

"(b) If the Congress to which the statement required by subdivision (a) of this section is transmitted, fails to enact a law apportioning Representatives among the several States, then each State shall be entitled, in the second succeeding Congress and in each Congress thereafter until the taking effect of a reapportionment under this Act or subsequent statute, to the number of Representatives shown in the statement based upon the method used in the last preceding apportionment. It shall be the duty of the Clerk of the last House of Representatives forthwith to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. * * *"

This much of the act of June 18, 1929, I have quoted, in order to show that it provided for the apportionment of four hundred and thirty-three Representatives among the various States according to population as indicated by the census, but in no way indicated how the number of Representatives allotted to each State should be chosen. The previous apportionment act of August 8, 1911, in sections 3 and 4, above quoted, made such a direction, but it is lacking in this later act of June 18, 1929. Upon the certificate of the President to Congress, followed by the certificate of the Clerk of the House, all in accordance with the provisions of the census and apportionment act of June 18, 1929, New York became entitled to forty-five Representatives instead of the forty-three apportioned to it under the act of 1911. This was an increase of two. How are the two to be elected?

The New York Legislature determined that it could be done by a joint resolution, and on April 10, 1931, divided

the State into forty-five congressional districts in this manner. The concurrent resolution not being a law was, of course, not submitted to the Governor for his approval, pursuant to the Constitution of this State. This method of electing Congressmen is here challenged on two grounds: First, because the Legislature must redistrict the State by a duly enacted law, and not by resolution, and second, if this be not so, the act of Congress, August 8, 1911, is still in force and effect.

The Constitution of the United States, article I, section 4, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

By the Constitution of the State of New York, article III, section 1, the legislative power of the State is vested in the Senate and Assembly. The law-making power, however, includes control or supervision by the Governor in so far as it is provided by article IV of the Constitution, section 9, that:

"Every bill which shall have passed the Senate and Assembly shall, before it becomes a law, be presented to the Governor; if he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it shall have originated, which shall enter the objections at large on the journal, and proceed to reconsider it. If after such reconsideration, two-thirds of the members elected to that house shall agree to pass the bill, it shall be sent together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two-thirds of the members elected to that house, it shall become a law notwithstanding the objections of the Governor."

When this government began to function under the Constitution adopted in 1787-1789, the then existing States apparently understood section 4, article I, of the Federal Constitution to refer to the law-making power of the Legislature or to such bodies as the individual States had created for the enactment of laws. The uninterrupted practice in all of the States has been to create congressional districts by laws enacted in accordance with the Constitution of the respective States, whatever that may be. While the plain

and direct provisions of a constitution cannot be modified or amended by practice, custom or violation, no matter how long continued, such uniformity by all the States in the method of electing Congressmen indicates quite clearly the meaning which was given to section 4 of article I, especially in the early days when the people were so sensitive to intrusion and control by individual executives. A uniform course of action involving the right to the exercise of an important power by the State government without question is no unsatisfactory evidence that the power is rightfully exercised. (Briscoe v. Bank of Kentucky, 36 U. S. 257; McPherson v. Blacker, 146 U. S. 1, pp. 36, 37; United States v. Sprague, 282 U. S. 716; Matter of Wendell v. Lavin, 246 N. Y. 115; People v. Tremaine, 252 N. Y. 27.)

The wording of section 4, article I, very likely suggested that the action by the State Legislature under it should be in the form of a law. It was to be more than an assent by the people of the State to some Federal proposition and more than a choice by them of a Federal representative. The legislative act was to be a direction to the people of the State demanding certain things to be done, fixing a time, a place, and a manner which had to be followed. From the Legislature was to come a mandate, the disobedience of which would result in penalties or legal consequences. Naturally, this would be effected in the same way as all other like mandates. The action of the Legislature would, therefore, be in the form of a law. Section 4 says that the times, places and manner shall be "prescribed" by the Legislature. "Prescribed" means to lay down authoritatively a rule of action. From time immemorial this has been done by a law according to the forms existing at the time. That which must be obeyed and followed by citizens subject to sanctions or legal consequences is a law. Such a direction must take the form of law. Likewise, in section 4, we find that Congress may exercise the power given to the State Legislature, and when it makes its regulations, it shall do so "by law." The matter being dealt with in section 4 is the time, place and manner of holding elections for Representatives. Whether these details be fixed by the Legislature of the State or by Congress, they are to be fixed by law. If Congress must do it by law, it is reasonable to suppose that the State Legislature was intended to do it in the same way. This at least has been the interpretation

given to this section for over one hundred and forty years, and it is too late now to overturn it.

There is a distinction to be drawn between the functions of a Legislature, such, for instance, as choosing Senators, making application to the Federal government for protection against invasion, ratifying a constitutional amendment, consenting to a purchase of State lands—there is, I say, a difference between these functions of the Legislature and the prescribing or enacting of a rule or direction, which must be followed and obeyed by the people of the State, called the law-making power; such, for instance, as dividing the State into congressional districts and directing the people where, when and how to vote. We find such a distinction referred to in McPherson v. Blacker (146 U. S. 1); State ex rel. Davis v. Hildebrant (241 U. S. 565); Hawke v. Smith (253 U. S. 221); United States v. Sprague (282 U. S. 716), although these cases did not pass upon the point here in question. (See, also, Matter of Doyle, 257 N. Y. 244.) We conclude, therefore, that the resolution of April 10, 1931, was ineffective, and that its attempted redistricting of the State is null and void.

Even if this were not so, we would be inclined to hold that the act of Congress, August 8, 1911, was still in force and effect as a regulation to be followed in providing for the election of an additional number of Representatives. Section 3 of that act certainly is a general provision which practically can apply to any increase or decrease in the number of Representatives. Section 4, while in terms limited to the apportionment under the act of 1911, also provides and enacts a general rule which may be adopted to subsequent changes in the number of Representatives, the rule being that additional Representatives are to be elected at large and the others according to existing laws. This is simple, direct and universal. The act of June 18, 1929, did not touch these matters, made no reference whatever to the provisions enacted in sections 3 and 4 of the Laws of 1911. The number of Representatives in any given State was automatically readjusted upon the certificate of the President after each census. This was the only thing accomplished by the act of June 18, 1929. We do not think that Congress intended to repeal the act of 1911 or thought that it would terminate upon the passage of the subsequent act. The two should be read together, if possible. One provided for the

method of election and the other merely for the number of Representatives. The two can be read together as a fair and reasonable regulation by Congress for the election of its Representatives, and this is the view we shall take of it.

Even if we were to take a different view, however, our conclusion would be that by the act of 1911 and the similar acts that preceded it, there had been a practical recognition by Congress of the just and reasonable rule to be followed in the absence of a statute, and that this rule should be adhered to even if the statute does not govern ex proprio vigore.

With this expression of our opinion, we hold that the resolution of April 10, 1931, is without effect; that forty-three of the forty-five Congressmen are to be elected according to the districts created by chapter 890 of the Laws of 1911 of the State of New York, as amended, and the additional two will be elected at large by the entire State. This, of course, is in the absence of a law passed by the present Legislature now in session, redistricting the State into forty-five congressional districts.

The order below should be affirmed, without costs.

Cardozo, Ch. J., Pound, Lehman, O'Brien and Hubbs, JJ., concur; Kellogg, J., not sitting.

Order affirmed.

COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 9th day of February in the year of our Lord one thousand nine hundred and thirty-two, before the Judges of said Court.

Witness, the Hon. Benjamin N. Cardozo, Chief Justice, presiding.

Wm. J. Armstrong, Clerk.

Remittitur February 10th, 1932.

In the Matter of the Application of SAMUEL KOENIG & Ors. for a Mandamus or*edr* ag'st EDWARD J. FLYNN, Secretary of State &c. and JAMES A. FARLEY, Chairman, etc., Intervener

Be it Remembered, that on the 15th day of January in the year of our Lord one thousand nine hundred and thirty-

two Samuel S. Koenig & ors., the appellants in this cause, came here unto the Court of Appeals, by Abraham S. Gilbert & ors., their attorney-, and filed in the said Court a Notice of Appeal and return thereto from the Order of the Appellate Division of the Supreme Court in and for the third Judicial Department. And Edward J. Flynn, Secretary of State, and James A. Farley, Chairman &c. Intervenur the respondent in said cause, afterwards appeared in said Court of Appeals by John J. Bennett, Jr., Attorney General and John Godfrey Saxe, their attorney-.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by *Mr.* Messrs. Abraham S. Gilbert and Benjamin L. Fairchild, of counsel for the appellants, and by Mr. Henry Epstein, of counsel for the respondent and by John Godfrey Saxe, and after due deliberation had thereon, did order and adjudge that the Order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without cocts.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore it is considered that the said order be affirmed, without costs as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, February 10th, 1932

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the

Court of Appeals, with the papers originally filed therein, attached thereto.

Wm. J. Armstrong, Clerk. (Seal.)

At a Term of the Supreme Court held in and for the County of Albany, at the County Court House, in the City of Albany, N. Y., on the 11th day of February, 1932.

Present: Honorable F. Walter Bliss, Justice Presiding.

SUPREME COURT, ALBANY COUNTY

In the Matter of the Application of SAMUEL S. KOENIG, JOHN J. KNEWITZ, and WILLIAM L. WARD for a Mandamus Order, Petitioners-Appellants,

against

EDWARD J. FLYNN, Secretary of State of the State of New York, Respondent, and JAMES A. FARLEY, Chairman of the Democratic State Committee, Intervenor-Respondent

The petitioners-appellants herein having appealed to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Third Judicial Department, affirming an order of the Supreme Court, Special Term, entered in the office of the Clerk of Albany County November 12, 1931, denying the petitioners' application for an order of mandamus directed to the Secretary of State, respondent herein, and the said appeal from the said order of the Appellate Division having been regularly brought on to be heard at a term of that court on the 15th day of January, 1932, and the petitioners-appellants having appeared by Abraham S. Gilbert, Esq., and Benjamin L. Fairchild, Esq., and the respondent Secretary of State having appeared by John J. Bennett, Jr., Attorney General of the State of New York (Henry Epstein, First Assistant Attorney General, of Counsel) and the intervenor-respondent, James A. Farley, Chairman of the Democratic State Committee, having appeared by John Godfrey Saxe, Esq., and the said appeal having been duly argued and the Court of Appeals having unanimously affirmed said order of the Supreme Court, Appellate Division, without costs,

Now, on reading and filing the remittitur from the Court of Appeals, and upon motion of John J. Bennett, Jr., Attorney General, attorney for the respondent, Secretary of State, it is

Ordered, that said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court.

F. Walter Bliss, J. S. C.

STATE OF NEW YORK,
County of Albany, Clerk's Office, ss:

I, John A. Knox, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify that I have compared the annexed copy Order with the original thereof filed in this office on the 11 day of Feb. 1932 and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this 23 day of Feb. 1932.

John A. Knox, Clerk. (Seal County of Albany.)

SIR:

Take notice that the within is a copy of order for judgment on remittitur duly filed and entered in the office of the Clerk of Albany County, on the 11 day of Feb. 1932.

Yours, etc., John J. Bennett, Jr., Attorney-General.

[Endorsed:] Supreme Court, Albany County. In the Matter of the Application of Samuel S. Koenig, etc., Petitioners-Appellants, against Edward J. Flynn, Secretary of State, etc., Respondent, and James A. Farley, Etc., Intervenor-Respondent. Copy. Order for judgment on remittitur. John J. Bennett, Jr., Attorney-General, Attorney for Respondent, Office and Post Office Address, Capitol, Albany, N. Y.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 15, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. 731

FILED
FEB 2
CHARLES ELMO

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1931.

SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD,

Petitioners,

against

EDWARD J. FLYNN, Secretary of State of the State of New York,

Respondent,

and

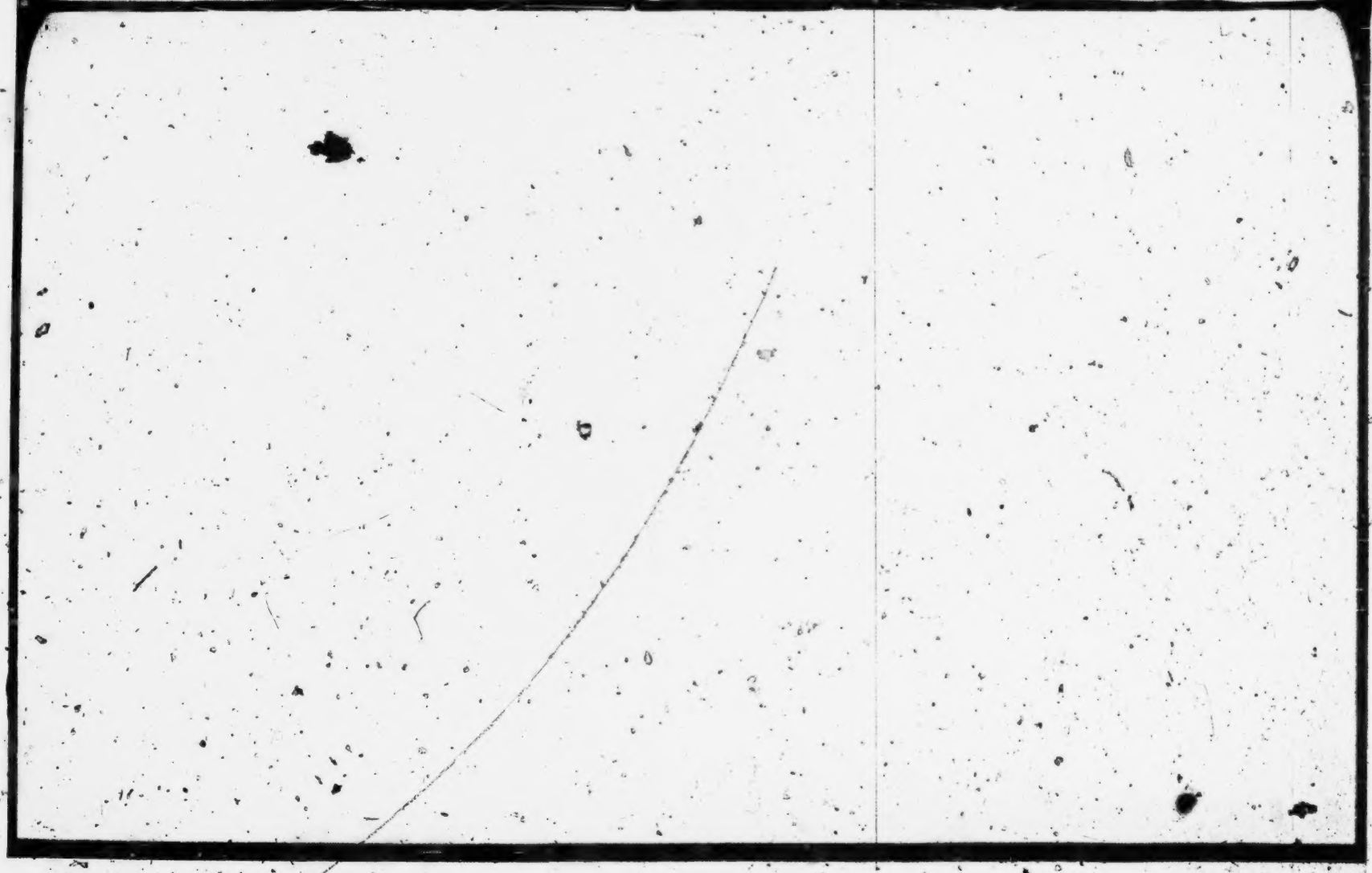
JAMES A. FARLEY, Chairman of the Democratic State Committee,

Intervenor-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE Supreme COURT ~~OF APPEALS~~ OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

ABRAHAM S. GILBERT,
BENJAMIN L. FAIRCHILD,
Counsel for Petitioners,
10 East 40th Street,
New York City,
New York.

THE BALLOU PRESS NEW YORK



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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1931.

SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD,
Petitioners,
against
EDWARD J. FLYNN, Secretary of State of the State of New York,
Respondent,
and
JAMES A. FARLEY, Chairman of the Democratic State Committee,
Intervenor-Respondent.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named, Samuel S. Koenig, John J. Knewitz and William L. Ward, pray for a writ of certiorari to review an order and decision of the Court of Appeals of the State of New York, being the court of last resort of that State, affirming a final order of the Supreme Court of the State of New York.

Questions Presented:

1. Has the word "Legislature" in Section 4 of Article I of the Constitution of the United States any other or dif-

ferent meaning than the same word in Section 1 Clause 2 Article II as adjudicated by this Court in *McPherson* v. *Blacker* (146 U. S. 1), or than that adjudicated by this court in *Hawke* vs. *Smith,* 253 U. S. page 221 and *U. S.* vs. *Sprague,* 282 U. S. page 716?

2. Has the Act of Congress of August 8, 1911 expired by its express terms and by force of its character, or is it still a valid and subsisting law of the United States?

3. Is the Concurrent Resolution adopted by the Senate and Assembly, constituting the Legislature of the State of New York, a valid and effective division of the State of New York into forty-five Congressional Districts pursuant to the provisions of Section 4 Article I of the Constitution of the United States?

Statement of the Case.

On April 10th, 1931 the Senate and Assembly vested with Legislative power of the State of New York (New York State Constitution, Article III, Section 1) adopted a Concurrent Resolution dividing the State of New York into forty-five Congressional Districts (R. 12; 37-58). Subsequently, the Attorney-General of the State by communication to the respondent, Secretary of State dated August 4, 1931, advised the Secretary of State that in the opinion of the Attorney-General this Concurrent Resolution of the Legislature of the State of New York was invalid and ineffective for any purpose in that it had not been approved by the Governor of the State of New York, pursuant to Article IV, Section 9 of the New York State Constitution (R. 13-14). The petitioners thereupon served a demand on the respondent, Secretary of State, that in issuing his certificates required by the Election Law of the State of New York in the year 1932 in connection with the election of Representatives in Congress, he recognize the Concurrent Resolution of April 10, 1931 of the Legislature of the State of New York as valid and effec-

tive (R. 14). The respondent, Secretary of State, refused to comply with this demand and notified the petitioners that he would treat the resolution in question as a nullity (R. 15): whereupon the petitioners made application to the Supreme Court of the State of New York for a mandamus order directing the Secretary of State to issue his election certificates in compliance with said Concurrent Resolution (R. 8-9). That application came on before Hon. Ellis J. Staley, a Justice of the Supreme Court of the State of New York at Special Term, and was denied by said Justice (R. 5-7). An appeal (R. 3-4) was thereupon taken to the Appellate Division of the Supreme Court of the State of New York, Third Department, from the order of Mr. Justice Staley denying the application for mandamus and said Appellate Court, after hearing argument, affirmed the order appealed from (R. 108-110). Your petitioners thereupon appealed (R. 106-107) to the Court of Appeals of the State of New York, the court of last resort, from the order of the Appellate Division of the Supreme Court and said Court of Appeals has affirmed the order of the Appellate Division (R. 137).

Reasons for Allowance of Writ.

1. This cause draws into question Section 4 Article I of the Constitution of the United States, the Act of Congress of August 8, 1911, and the Act of Congress of June 18, 1929.

2. The questions involved or some of them have arisen in four states, viz: New York, Illinois, Minnesota and Missouri.

The Supreme Court of Minnesota in a proceeding instituted to restrain the Secretary of State from receiving certificates of nomination in Congressional Districts established by a bill vetoed by the Governor of Minnesota, has held

(a) That the Act of Congress of August 8, 1911 has expired.

(b) That the word "Legislature" used in Section 4 of Article 1 of the United States Constitution means the bi-cameral body and excludes the Governor.

(c) That the Legislature of Minnesota validly established Congressional Districts.

Smiley vs. *Holm,* 238 N. W. Rep. page 494.

The Supreme Court of Illinois has held that the Act of Congress of August 8, 1911 has not expired and is a subsisting, valid law of the United States, and that an Act of the Legislature of Illinois dividing the State into Congressional Districts, was void and of no effect because violative of the provisions of the Act of Congress of August 8, 1911 (*Moran* vs. *Bowley,* not yet reported).

The Supreme Court of Missouri, has held:

(a) That the Act of August 8, 1911 has not expired but is still a subsisting law of the United States.

(b) That the word "Legislature" used in Section 4, of Article I of the Constitution of the United States means the lawmaking power of the State of Missouri including the Governor.

State ex rel. Carroll v. *Becker,* not yet reported.

The Court of Appeals of the State of New York, in the instant case, has held:

(a) That the word "Legislature" as used in Section 4 of Article I of the Constitution of the United States means the law-making power of the State including the Governor (R. 133-134).

(b) That the Act of Congress of August 8th, 1911 has not expired and continues to be a valid and enforcible law of the United States (R. 134-135).

(c) That consequently, the attempted division of the State of New York by Concurrent Resolution of the Legislature not approved by the Governor of the State, was ineffective (R. 134).

3. The election of Representatives in Congress being the election of Federal officers governed by the controlling provisions of Article I, Section 4 of the United States Constitu-

tion the law applicable thereto should be uniform throughout the United States.

WHEREFORE your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court directed to the Supreme Court ~~of Appeals~~ of the State of New York commanding the said Court to certify the above cause to this Court for review and determination as provided by law, and that your petitioners may have such other or further relief or remedy in the premises as this Court may deem appropriate.

Dated, February 18, 1932.

SAMUEL S. KOENIG,
JOHN J. KNEWITZ,
WILLIAM L. WARD,
(Petitioners)

By ABRAHAM S. GILBERT,
BENJAMIN L. FAIRCHILD,
Counsel for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1931.

SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD,
Petitioners,
against
EDWARD J. FLYNN, Secretary of State of the State of New York,
Respondent,
and
JAMES A. FARLEY, Chairman of the Democratic State Committee,
Intervenor-Respondent.

BRIEF IN SUPPORT OF PETITION.

A.

Opinions of the Courts Below.

The opinion rendered in the Supreme Court, Albany County, Special Term, appears in 141 Misc. 840 and in the Record, pages 92-103.

The opinions rendered by the Appellate Division of the Supreme Court, Third Department, have not yet been reported but appear in the Record, pages 111-125.

The opinion of the Court of Appeals, the Court of last resort of the State of New York, has not yet been reported but appears in the Record, pages 127-136.

B.

Jurisdiction.

The Appellate jurisdiction of the Supreme Court of the United States is invoked under Section 237 Judicial Code of the United States (28 U. S. C. A. Sec. 344) to correct error of the Court of Appeals of the State of New York in the above cited case.

The petitioners brought suit in the Supreme Court of the State of New York to compel the Secretary of the State of New York, by Mandamus Order, to recognize the validity of a concurrent resolution adopted by the Senate and Assembly, constituting the Legislature of the State of New York (New York State Constitution, Article III, Sec. 1) adopted April 10, 1931, dividing the State of New York into forty-five congressional districts. The Supreme Court of the State of New York at Special Term denied the application for a mandamus order (R. 5-7). The Appellate Division of the Supreme Court of the State of New York affirmed the order of the Court at Special Term (R. 108-110). The Court of Appeals of the State of New York has affirmed the order of the Appellate Division of the Supreme Court of the State of New York, Third Department, which affirmed the order made in Special Term (R. 137).

The case at bar comes within the Appellate jurisdiction of this Court by reason of the admitted allegations set forth in the petition for the mandamus order, which facts are not here repeated to save space and the time of this Court. The provisions of Article I, Section 4 of the Constitution of the United States and the Act of Congress of August 8, 1911 and the Act of Congress of June 18th, 1929, are drawn into question. It was contended by the petitioners in the Court below that the word "Legislature" in Section 4 of Article I of the Constitution of the United States means the same bi-cameral body (the Senate and Assembly constituting the Legislature of the State of New York) as the bi-cameral body referred

to in Section 1, Clause 2 of Article II, and Article V and other sections of the Constitution of the United States where the term "legislature" is used; that under the Constitution of the State of New York, the Governor was not part of the bi-cameral body; that the Act of Congress of August 8th, 1911 was by its express terms, limited in its purpose and effect to the apportionment made thereby, and expired with the apportionment of members of the House of Representatives to the various states under the Act of Congress of June 18, 1929; that the Legislature of the State of New York was not restricted in its creation of Congressional Districts for the election of Representatives in Congress by the provisions of the Act of August 8th, 1911; that the resolution of the Legislature of the State of New York redistricting the State into 45 Congressional Districts did not require the approval of the Governor of the State of New York and was valid and effective without such executive action.

The Court of Appeals of the State of New York has held:

(a) That the word "Legislature", as used in Sec. 4 of Article I of the Constitution of the United States, has a meaning different and other from that assigned to it by this Court under other articles and sections of the United States Constitution, and means in said Sec. 4 of Article I the law-making power of the State of New York, including the Governor (R. 133-134);

(b) That the Act of Congress of August 8th, 1911 has not expired and continues to be a valid and enforceable law of the United States (R. 134-135); and

(c) That the attempted division of the State of New York by concurrent resolution of the Legislature, not approved by the Governor of the State was ineffective (R. 134).

The petition of W. Yale Smiley to this Court to review the final judgment of the Supreme Court of Minnesota in

Smiley v. *Holm,* involving questions similar to those presented by the case at bar, has been granted by this Court and that case (*Smiley* v. *Holm*) is now in this Court for adjudication.

Smiley v. *Holm,* No. 617 October 1931 Term, writ of certiorari granted by the Supreme Court of the United States February 15th, 1932.

C.

Statement of Facts.

The facts involved in the case at bar are not in dispute. They were admitted by the respondents in their argument and in the briefs below. They are substantially as set forth in the petition (pp. 2-3).

D.

Specifications of Error.

1. The Court of Appeals of the State of New York erred in affirming the order of the Appellate Division of the Supreme Court, Third Department, which had affirmed an order of the Supreme Court at Special Term, denying petitioner's application for a mandamus order.

2. The Court of Appeals of the State of New York erred in construing the word "Legislature" in Article I, Section 4 of the Federal Constitution as meaning the law-making power of the State of New York, including the Governor, requiring executive action by the Governor of that State.

3. The Court of Appeals of the State of New York erred in holding that the Act of Congress of August 8th, 1911 is an existing and continuing valid act of Congress.

4. The Court of Appeals of the State of New York erred in holding that the concurrent resolution adopted by the Legislature of the State of New York on April 10th, 1931 was invalid and ineffective because it had not received the approval of the Governor of the State of New York.

E.

Summary of Argument.

The contentions of the petitioners may be briefly summarized as follows:

Petitioners contend that the word "Legislature" as used in Section 4 of Article I of the Constitution of the United States means the bi-cameral body (in New York State the Senate and Assembly) constituting the Legislature of the State of New York; that it has the same meaning in Section 4 of Article I as in Section 1 Clause 2 of Article II and elsewhere in the Constitution; that this Court has definitely held that the word "Legislature" as used in Section 1 Clause 2 of Article II and in Article V and other sections of the Constitution means the bi-cameral body and excludes executive action by the Governor.

Petitioners further contend that the Act of August 8th, 1911 was limited to the apportionment therein made and expired with the enactment of the Act of June 18th, 1929 and the new apportionment thereunder, wherefor respondent's view of the case of *Ohio ex rel. Davis* v. *Hildebrandt*, 241 U. S. 565, is not applicable to the case at bar.

It is further contended by the petitioners that no distinction can be drawn between the legislative activity in respect of the election of representatives in Congress under Section 4 of Article I of the Constitution of the United States and the activity of the Legislature in respect of the election of United States Senators pursuant to the same section, and in respect of other duties conferred upon the Legislatures of the States pursuant to other sections of the United States Constitution; that in any event, the action of the Legislature of the State

of New York now in question, i. e., the division of the State into Congressional Districts, was not a State lawmaking function as held by the Court of Appeals of New York but the exercise of a political or administrative function pursuant to the provisions of Sec. 4 of Article I of the United States Constitution; wherefor petitioners contend that the concurrent resolution of the Legislature of the State of New York now in question is a valid and effective subdivision of the State of New York into 45 Congressional Districts.

POINT I.

The meaning of the word "Legislature" as used in the Constitution of the United States has been settled by this Court.

McPherson vs. *Blacker*, 146 U. S. 1;
Hawke vs. *Smith*, 253 U. S. 221;
United States vs. *Sprague*, 282 U. S. 716.

In the cases cited this Court held the word "Legislature" to mean the bi-cameral body representing the People of the State.

POINT II.

The case of *Ohio ex rel. Davis* vs. *Hildebrandt*, 241 U. S. 565, is not applicable to the case at bar.

In *Davis* vs. *Hildebrandt*, *supra*, this Court had before it two principal questions:

1. Whether the Act of Congress of August 8, 1911 was constitutional; and

2. Whether that Act was applicable to a law of the State of Ohio dividing that State into Congressional Districts.

With respect to these two questions, this court held

1. That the Act of Congress of 1911 was constitutional; and

2. That by reason thereof the Ohio statute was properly submitted to the people of Ohio pursuant to the referendum provisions of the Constitution of Ohio.

That case (*Davis* vs. *Hildebrandt*) is only applicable in support of respondent's contention if the Act of August 8, 1911 has survived and is still a subsisting and valid law of the United States.

Our contention is that the Act of August 8, 1911 has expired and is no longer a subsisting and valid law.

POINT III.

The Act of Congress of August 8, 1911 (Chapter 5, 37 Statutes at Large 13) was limited to the apportionment therein made and expired with the new apportionment under the Act of June 18, 1929.

It is our contention that that Act (Act of August 8, 1911) was a temporary statute, limited in duration at the time of its enactment by the express language thereof and by force of its character, and has therefore expired.

26 A. & E. Enc. of Law, page 534, citing 1 Bouv. Inst. 112.

In accordance with the provisions of the Federal Constitution a census of the population of the United States was had in 1790 following which Congress passed its first apportionment act, effective April 14, 1792 (1 Stat. at Large 253). This was a very brief act, consisting of but one short paragraph, conforming to the requirements of the Constitution and fixed the basis for representation in Congress. Similar

acts followed the census of 1800, 1818, 1820 and 1830 (2 Stat. at Large, 128, 2 Stat. at Large, 669, 3 Stat. at Large 651, 4 Stat. at Large 516).

Following the census of 1840 Congress passed its Sixth Apportionment Act (5 Stat. at Large 491). It consisted of two paragraphs, the first one apportioning the number of representatives to the various states; the second Section provided

> "That in every state where a state is entitled to more than one representative in Congress, the number shall be elected by districts composed of contingious territory equal in number to the number of representatives to which such state may be entitled no district to be entitled to more than one representative."

In 1850 Congress enacted a statute effective May 23, 1850 (9 Stat. at Large 433) which provided for the taking of the Seventh Decennial Census and for the apportionment of representatives in Congress. It contained no provision for the election of representatives by districts.

Following the census of 1860 Congress enacted its Eighth Apportionment Act (12 Stat. at Large 353), and following each census thereafter down to and including the Thirteenth Census, Congress enacted apportionment acts substantially repeating the preceding apportionment act, but adding provisions from time to time with reference to the method of electing representatives in Congress (17 Stat. at Large, 28, 22 Stat. at Large 5, 26 Stat. at Large 735, 31 Stat. at Large 733, 37 Stat. at Large 13).

Beginning with the Act of 1880 (22 Stat. at Large 5) each apportionment act by express language limited its application to the apportionment then made.

The Act of August 8, 1911 following the census of 1910 contains express language limiting its application to the apportionment made thereunder and that act in Section 4 thereof contained a provision which appears for the first time in this series of legislation, requiring the subdivision of states into congressional districts *by law of the state.* It

makes provision for continuing the congressional districts existing on August 8, 1911 where there has been no increase, or an increase, in the number of representatives apportioned to the state, and in case of an increase it made provision for the election of additional representatives at large, until the State had been redistricted pursuant to the laws thereof.

Congress failed in its duty to apportion representatives in Congress following the Fourteenth Census. In June 1929 Congress enacted a census and Apportionment Act (37 Stat. at Large 13) similar to the Act of 1850 (9 Stat. at Large 433), except that it provided a different method of determining the number of representatives apportioned to the various states. Under the Act of June 18, 1929 the number was apportioned by certificate of the President based upon the census of 1930.

The apportionment thus made increased the number of representatives in the State of New York and in other states, and decreased the number of representatives in Minnesota, Missouri and in some other states. It is impossible to make the Act of August 8, 1911 apply to conditions now existing in a state such as New York which has an increased number of representatives. The Missouri Supreme Court has held in a case recently decided and not yet reported (*Carroll* vs. *Becker*) that under the circumstances the State of Missouri was compelled to elect its representatives at large.

POINT IV.

No distinction can reasonably be drawn between the legislative activity in respect of the election of representatives in Congress under Section 4 of Article I of the Constitution and the activity of the Legislature in respect of the election of United States Senators pursuant to the same section and in respect of the appointment of Presidential Electors under Section 1, Clause 2, Article II, and of other duties conferred upon the legislatures of the States pursuant to other sections of the United States Constitution.

What the word "Legislature" means when used in Article II, Section 1, Clause 2, as determined by this Court in *McPherson* v. *Blacker, supra,* and in Article V of the Constitution as determined by this Court in *Hawke* vs. *Smith, supra,* it must reasonably be held to mean whenever used in the same document.

Behan vs. *The People,* 17 N. Y. 516, at page 520;
Mangam v. *The City of Brooklyn,* 98 N. Y. 585, 591-2;
The Cherokee National vs. *George,* 5 Pet. 1, 18-20;
25 Ruling Case Law, 995;
2 Lewis Sutherland on Statutory Construction, p. 578;
Hood Rubber Company vs. *Comm. of Corp.,* 167 N. E. 670;
Pine vs. *Commonwealth,* 121 Va. 812;
Clifford vs. *West Hartford Creamery Co.,* 153 Atl. 205;
Lewellyn vs. *Harbison,* 31 Fed. 2nd 740, 842;
In re Kirkstall Brewery Co., Ltd., 5 Ch. D. 535;
R. vs. *Poor Law Commissioners,* 6 A. & E. 56;
Courtauld vs. *Legh,* L. R. IV Ex. 126.

We quote from the opinion of Cleasby, B., in *Courtauld* vs. *Legh,* as follows:

> "It is a sound rule of construction to give the same meaning to the same words occurring in different parts of an act of parliament or other document."

Chief Judge Ruger, writing for the Court of Appeals of New York in *Mangam* vs. *The City of Brooklyn, supra,* at page 592, quotes from *R.* vs. *Law Commissioner, supra,* the following:

> "'We disclaim altogether the assumption of any right to assign different meanings to the same words in an act of Parliament on the ground of a supposed general intention in the act, we think it is necessary to give a fair and reasonable construction to the language used by the legislature; but we are not to assume the unwarrantable liberty of varying that construction for the purpose of making the act consistent with any views of our own'."

In *In re Kirkstall Brewing Company, Ltd., supra,* the Court said:

> "It is at all events reasonable to presume that the same meaning is intended for the same expression in every part of the act."

The use of this word "Legislature" both in respect of the choosing of Senator (Sec. 3, Art. I) and prescribing the times, places and manner of choosing the Senators (Sec. 4, Art. I) and prescribing the times, places and manner of electing Representatives in Congress (Id.), when taken in connection with the use of the word "Legislature" in respect of the appointment of electors, the ratification of amendments to the Constitution, the calling for assistance of the Federal Government in case of internal disturbance, the consent necessary to acquiring property in the state by the Federal Government for Federal purposes, all confirm the view that the word "Legislature", wherever used in the Constitution of the United States, means the same body representing the

people of the state, so definitely described by this Court in *Hawke* v. *Smith, supra.*

The meaning of the word "Legislature" as used in Article V of the Federal Constitution was again before this Court in *United States of America* vs. *Sprague,* decided February 24th, 1931 (282 U. S. 716). Mr. Justice Roberts, delivering the opinion of the Court in that case, said at page 730:

> "The United States asserts that Article V is clear in statement and in meaning, contains no ambiguity, *and calls for no resort to rules of construction.* A mere reading demonstrates that this is true."

We respectfully submit that the prayer of the petitioners should be granted.

ABRAHAM S. GILBERT,
BENJAMIN L. FAIRCHILD,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 731.

SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD,
Petitioners-Appellants,

against

EDWARD J. FLYNN, Secretary of State of the State of New York,
Respondent,

and

JAMES A. FARLEY, Chairman of the Democratic State Committee,
Intervenor-Respondent.

MOTION TO ADVANCE.

A. S. GILBERT,
BENJAMIN L. FAIRCHILD,
Counsel for Petitioners.

THE BALLOU PRESS NEW YORK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1931.

SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD, Petitioners-Appellants, against EDWARD J. FLYNN, Secretary of State of the State of New York, Respondent, and JAMES A. FARLEY, Chairman of the Democratic State Committee, Intervenor-Respondent.	No. 731.

SIRS:

PLEASE TAKE NOTICE that the annexed motion to advance will be presented to the Supreme Court of the United States, at Washington, D. C., on March 14th, 1932, at the opening of the Court, or as soon thereafter as counsel can be heard.

Dated, March 1st, 1932.

Yours, &c.,

A. S. GILBERT,
BENJAMIN L. FAIRCHILD,
Counsel for Petitioners.

To:

Hon. JOHN J. BENNETT, Attorney General,
Counsel for Respondent, Flynn.

Hon. JOHN GODFREY SAXE,
Counsel for Respondent, Farley.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD, Petitioners-Appellants, against EDWARD J. FLYNN, Secretary of State of the State of New York, Respondent, and JAMES J. FARLEY, Chairman of the Democratic State Committee, Intervenor-Respondent.	No. 731.

MOTION TO ADVANCE.

The petitioners-appellants move (1) that this cause be advanced for early hearing; and (2) that this cause be heard or considered together with *Smiley* vs. *Holm,* No. 617 on the docket of this Court.

The petitioners pray that this motion be considered with the petition for certiorari in this cause.

In support hereof the petitioners make the following brief statement of the matter involved, and the reasons relied upon for the relief sought.

A speedy determination of this cause and settlement of the questions therein raised is desirous in the public interest for the following reasons: (a) The case presents questions of great public interest involving the construction of Section 4 of Article I of the Constitution of the United States, and of the Act of Congress of June 8th, 1929, and further involves

the question whether the Act of Congress of August 8th, 1911 has expired or is still a subsisting and valid law of the United States, and (b) The questions involved, or some of them, have arisen in four states, namely: New York, Illinois, Minnesota and Missouri. The case in Minnesota is *Smiley* vs. *Holm*, No. 617, October Term 1931.

In the latter case this Court on February 15th, granted a writ of certiorari, and on the joint application of adversary counsel this Court has advanced the cause for argument and directed that it be heard on March 14th, for the reason among others that a primary election will be held in Minnesota on June 20th, 1932, and it is necessary that candidates for nomination to Congress file not later than May 11th, 1932.

In New York State the primary election at which candidates for Representatives in Congress are nominated will be held on the second Tuesday of September, and it will be necessary for designations of candidates for representatives in the Congress of the United States to be filed not later than August 16th.

The above-entitled cause presents the same principal questions as are presented in *Smiley* vs. *Holm*, No. 617 on the docket of this Court, but differs in respect of the following:

(a) The Minnesota Constitution contains a provision directing the subdivision of the State into Congressional Districts by the Legislature of that State; the New York State Constitution contains no such provision and is entirely silent as to the subdivision of the State into Congressional Districts.

(b) In Minnesota the Legislature passed an act which was submitted to the Governor of Minnesota for approval and which was vetoed by him; in New York State the Legislature acted by Concurrent Resolution.

The above-entitled cause was docketed in this Court on the 25th of February last, and notice thereof with a copy of the petition for writ of certiorari, brief in support thereof and transcript of the record was served on adversary counsel on February 26th last. The time of respondents to file their

brief in opposition to the application for writ of certiorari will not expire until March 17th next. Your petitioners have requested respondents through their respective counsel to join in this application, but they have declined to do so.

WHEREFORE your petitioners pray that this cause be advanced for argument and he heard, or considered together with *Smiley* vs. *Holm*, No. 617 on the docket of this Court, set for argument for March 14, 1932, to the end that this Court may have both causes for disposition at the same time, and further to this end, that disposition of this motion and petitioners' motion for a writ of certiorari may be had on or by March 22, 1932 and this cause set for argument on March 24, 1932.

Respectfully submitted,

ABRAHAM S. GILBERT,

BENJAMIN L. FAIRCHILD,

Counsel for Petitioners-Appellants.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 731.

SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD,

Petitioners,

against

EDWARD J. FLYNN, Secretary of State of the State of New York,

Respondent,

and

JAMES A. FARLEY, Chairman of the Democratic State Committee,

Intervenor-Respondent.

BRIEF ON BEHALF OF PETITIONERS-APPELLANTS.

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New York.

THE BALLOU PRESS NEW YORK

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1931.

SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD, Petitioners, against EDWARD J. FLYNN, Secretary of State of the State of New York, Respondent, and JAMES A. FARLEY, Chairman of the Democratic State Committee, Intervenor-Respondent.	No. 731.

BRIEF ON BEHALF OF PETITIONERS-APPELLANTS.

On certiorari to the Supreme Court of the State of New York to review an order and judgment of the Court of Appeals of the State of New York, being the court of last resort of that state; petition for certiorari granted by this Court March 15th, 1932.

A.

Opinions Delivered in the Courts Below.

The opinion of the Court of Appeals, the Court of last resort of the State of New York, is reported in 258 N. Y. page 292, and appears in the Record, pages 128-134.

The opinions of the Appellate Division of the Supreme Court of the State of New York, Third Department, are

reported in 234 App. Div. 139, and appear in the Record, pages 111-125.

The opinion of the Supreme Court, Albany County Special Term, is reported in 141 Misc. 840 and appears in the Record, pages 92-103.

B.

Jurisdiction of the Court.

The Appellate jurisdiction of this Court is invoked under Section 237 of the Judicial Code of the United States (28 U. S. C. A. Section 344, subdivision b), to correct error of the Court of Appeals of the State of New York, the court of last resort in that State.

The order and judgment of the Court of Appeals is dated February 9, 1932 (R., 134-135).

The order and judgment of the Court of Appeals was made the order and judgment of the Supreme Court of the State of New York February 11, 1932 (R., 136-137).

The controversy presented by this cause involves the validity of a Concurrent Resolution adopted by the Legislature of the State of New York (Senate and Assembly, New York State Constitution, Article III, Section 1) (R., pp. 37 to 55), which resolution divided the State of New York into forty-five Congressional Districts. It involves the construction of Section 4 of Article I of the Constitution of the United States and also the question whether the Congressional Act of August 8, 1911 (Chapter 5; 37 Stat. at L. 13) has expired or is still a valid and subsisting law of the United States. The Court below held:

> "The matter being dealt with in Section 4 is the time, place and manner of holding elections for Representatives. Whether these details be fixed by the Legislature of the State or by Congress they are to be fixed by law. If Congress must do it by law, it is reasonable to suppose that the State Legislature was intended to do it in the same way." (R., pp. 132-133).

The Court below further held:

> "Even if this were not so, we would be inclined to hold that the Act of Congress, August 8, 1911 was still in force and effect as a regulation to be followed in providing for the election of an additional number of representatives." (R., p. 133).

and further

> "The two (Act of August 8, 1911 and Act of June 18, 1929) can be read together as a fair and reasonable regulation by Congress for the election of its representatives, and this is the view we should have taken."

The Court below further held:

> "Even if we were to take a different view, however, our conclusion would be that by the Act of 1911 and the similar acts that preceded it, there had been a practical recognition by Congress of the just and reasonable rule to be followed in the absence of a statute, and that this rule should be adhered to even if the statute does not govern ex proprio vigore.
>
> With this expression of our opinion, we hold that the resolution of April 10, 1931, is without effect; that forty-three of the forty-five Congressmen are to be elected according to the districts created by chapter 890 of the Laws of 1911 of the State of New York, as amended, and the additional two will be elected at large by the entire State. This, of course, is in the absence of a law passed by the present Legislature now in session, redistricting the State into forty-five congressional districts."

The case clearly involves a Federal question.

Lytle vs. *Arkansas,* 63 U. S. (22 Howard), page 202;
Maguire vs. *Tyler,* 1 Black 195; 66 U. S. 195;
Montana ex rel Haire vs. *Rice,* 204 U. S. 291.

C.

Statement of the Case.

The Senate an Assembly of the State of New York (The Legislature of that State, New York Constitution, Article III, Sec. 1) adopted on April 10th, 1931 a Concurrent Resolution dividing the State into forty-five Congressional Districts (R., pp. 37 to 55 inclusive). It was not submitted to the Governor of the State for approval under Section 9, Article IV of the Constitution of the State of New York (R., p. 12). Prior to the adoption of this Concurrent Resolution, the State of New York had been divided into forty-three Congress Districts by Chapter 890 of the Laws of 1911 of the State of New York as Amended (R., p. 12). The subdivision of the state into forty-five Congress Districts was made by the Legislature of the State of New York following the apportionment of forty-five Representatives in the House of Representatives to the State of New York by virtue of the Act of Congress approved June 18th, 1929 (R., pp. 18 to 32; 37).

Following the adoption of the resolution by the Legislature of the State of New York, the Attorney General of the State by communication addressed to the respondent Flynn as Secretary of State, dated on or about the 4th of August, 1931, advised the respondent Flynn that the Concurrent Resolution of the Senate and Assembly of the State of New York, adopted April 10th, 1931, was ineffective and advised the respondent as Secretary of State that, in issuing his certificate or certificates pursuant to Section 69 of the Election Law of the State of New York, at least three months prior to the General Election to be held in November, 1932, it would be his official duty to disregard the said Concurrent Resolution of April 10th, 1931, and treat the same as ineffective (R., pp. 13-14).

Section 69 of the Election Law of the State of New York requires the respondent Flynn as Secretary of State, at least

three months before the General Election to be held in November, 1932, to make and transmit to the Boards of Elections of each county of the State and of the City of New York a certificate or certificates, stating, among other things, the number of representatives in Congress who may be lawfully voted for at such election by the voters of the respective counties of the State (R., p. 13).

Following the publication of the opinion of the Attorney General, the petitioners demanded of the respondent Flynn that in issuing the certificates required by the Election Law, he conform to the provisions of the Concurrent Resolution above referred to. The respondent Secretary of State refused to comply with the demand and admitted on the argument that "the respondent intends to be governed by and to follow the opinion of the Attorney General and intends to treat the said Concurrent Resolution, Exhibit D hereto annexed, as ineffective, and further intends to certify to the Board of Elections of each county of the City of New York that representatives in Congress should be elected by the People of the State of New York at the General Election to be held in November, 1932 in the districts prescribed in and by Chap. 890 of the Laws of 1911 as Amended" (R., p. 15).

Alleging that the controversy involved the construction of Sec. 4 of Article I of the Constitution of the United States, and of the Acts of Congress of August 8th, 1911 and June 18th, 1929, and the grave public importance of the questions presented, (R., p. 15) the petitioners prayed the Supreme Court of the State of New York for a mandamus order requiring the respondent Flynn, in issuing his certificate or certificates in the year 1932, pursuant to the Election Law of the State of New York "to certify that 45 representatives in the House of Representatives of the Congress of the United States in the Seventy-third Congress are to be elected in the Congressional districts as defined in the Concurrent Resolution of the Senate and Assembly of the State of New York, adopted April 10th, 1931, entitled 'Concurrent Resolution of the Senate and Assembly constituting the Legislature of the

State of New York, subdividing the State of New York into 45 Congressional Districts and defining the boundaries thereof, and Exhibit 'D' hereto annexed, and that he be directed to perform every other duty devolving on him under the Election Law pertaining to any matter contained in said Concurrent Resolution in accordance with said Concurrent Resolution and not otherwise" (R., pp. 16-17).

Upon motion of James A. Farley, Chairman of the Democratic State Committee, he was permitted to intervene as a respondent (R., p. 6).

The motion for a mandamus order was argued before Mr. Justice Ellis J. Staley, sitting at Special Term of the Supreme Court who denied the motion as matter of law by order dated October 15th, 1931 (R., pp. 5 to 7). On appeal to the Appellate Division of the Supreme Court that court affirmed the order made at Special Term and denied the application for a mandamus order as matter of law, and not in the exercise of discretion (R., p. 110). The order of the Appellate Division was affirmed by the Court of Appeals of the State of New York (R., pp. 134-135). And the order and judgment of the Court of Appeals of the State of New York was made the order and judgment of the Supreme Court, February 11th, 1932 (R., pp. 136-137).

Section 4 of Article I of the Constitution of the United States, the construction of which is involved in this controversy is as follows:

> "Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of chusing Senators.
>
> The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day."

The Act of August 8th, 1911, the construction of which is involved in this controversy is annexed hereto as an Appendix.

The Act of June 18th, 1929 is printed in the Record at pages 18 to 32.

D.

Assigned Errors Intended to Be Urged.

The petitioners-appellants intend to urge the following specification of errors:

(1) The Court of Appeals of the State of New York erred in construing the word "Legislature" in Article I, Section 4 of the Federal Constitution as meaning, with respect to the division of the state into Congressional Districts, the law-making power of the State of New York, including the Governor.

(2) The Court of Appeals of the State of New York erred in holding that the Act of Congress of August 8th, 1911 is an existing and continuing valid act of Congress.

(3) The Court of Appeals of the State of New York erred in holding that the concurrent resolution adopted by the legislature of the State of New York on April 10th, 1931 was invalid and ineffective because it had not received the approval of the Governor of the State of New York.

E.

Summary of Argument.

POINT I. The word "Legislature" in Section 4 of Article I means the same representative body referred to in Article II, Section 1 and elsewhere in the Constitution.

POINT II. The power conferred on the "Legislature" by the federal Constitution may not be circumscribed by a state Constitution.

POINT III. Resort to the doctrine of practical construction, if proper at all in the case at bar, does not support respondents' contention that the word "Legislature" in Section 4 of Article I of the Constitution of the United States, means "The law making power of the State" or the "State".

POINT IV. The Act of Congress of August 8, 1911, Chapter 5, 37 Stat. L. 13, was limited by its title and its terms to the apportionment therein made and expired with the apportionment made pursuant to the Act of June 18th, 1929.

POINT I.

The word "Legislature" in Section 4 of Article I means the same representative body referred to in Article II, Section 1, in the Constitution.

The word "Legislature" must reasonably be held to have the same meaning wherever used in the United States Constitution.

Gibbons v. *Ogden,* 9 Wheat. 1 at p. 194;
Behan vs. *The People,* 17 N. Y. 516, at p. 520;
Mangam vs. *The City of Brooklyn,* 98 N. Y. 585; 591-2;
The Cherokee Nation vs. *George,* 5 Pet. 1, 18-20;
25 Ruling Case Law 995;
2 Lewis Sutherland on Statutory Construction, p. 578;
Hood Rubber Company vs. *Comm. of Corp.,* 167 N. E. 670;
Pine vs. *Commonwealth,* 121 Va. 812;
Clifford v. *West Hartford Creamery Co.,* 153 Atl. 205;
Lewellyn v. *Harbison,* 31 Fed. 2nd 740, 842;
In re Kirkstall Brewery Co., Ltd., 5 Ch. D. 535;
R. vs. *Poor Law Commissioners,* 6 A. & E. 56;
Courtauld vs. *Legh,* L. R. IV Ex. 126;
Smiley vs. *Holm,* 238 N. W. 494.

See also opinion in *Smiley* v. *Holm* of Loevinger, D. J., published in Cong. Record January 14, 1932, pages 2040-45 (not otherwise reported).

We quote from the opinion of Cleasby, B., in *Courtauld* vs. *Legh,* as follows:

> "It is a sound rule of construction to give the same meaning to the same words occurring in different parts of an act of parliament or other document."

Chief Judge Ruger, writing for the Court of Appeals (New York), in *Mangam* vs. *The City of Brooklyn, supra,* at page 592, quotes from *R.* vs. *Poor Law Commissioner, supra,* the following:

> "'We disclaim altogether the assumption of any right to assign different meanings to the same words in an act of Parliament on the ground of a supposed general intention in the act, we think it is necessary to give a fair and reasonable construction to the language used by the legislature; but we are not to assume the unwarrantable liberty of varying that construction for the purpose of making the act consistent with any views of our own."

In re Kirkstall Brewing Company, Ltd., supra, the Court said:

> "It is at all events reasonable to presume that the same meaning is intended for the same expression in every part of the act."

Ch. J. Marshall in *Gibbons* vs. *Ogden* (*supra*) page 194, said:

> "If this be the admitted meaning of the word (commerce) in its application to foreign nations it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it."

To the same effect is

Moeler v. *The Bank,* 258 New York 373 at p. 378.

It has been held by this Court that the Federal Constitution is "an instrument of exact expression".

Myers vs. *United States,* 272 U. S. 52; p. 233.

Upon this assumption, every word and phrase must be given effect.

Blake vs. *McClung,* 172 U. S. 239;
Knowlton vs. *Moore,* 178 U. S. 41.

Tested by these rules, in the light of conditions existing at the time, and the problems presented, it is clear that the

framers of the Constitution intended the "Legislature" to which they delegated the power in Section 4 of Article I to be the same representative body to which power was delegated by Section 1 of Article II, and elsewhere in the Constitution.

The problem before the Convention was the organization of the National Legislature subsequently called the Congress. Various proposals were submitted resulting finally in a decision that there be two branches and that the members of the second branch (the Senate) should be elected by the Legislatures of each state. The original proposition was that representatives "be elected by the people of the several states".

> *Story Commentaries on the United States Constitution,* 4th Edition, Section 574, pp. 408, 409.

General Pinckney moved that the first branch (the House) instead of being elected by the people, be elected *in such manner as the Legislature* of each state should direct. He urged:

> (1) That this liberty would give more satisfaction, as the legislatures could then accommodate the *mode* to the conveniency and opinions of the people.
>
> (2) That it would avoid the undue influence of large counties which would prevail *if the elections were to be made in districts as must be the mode intended by the report of the committee.*
>
> Madison's notes in the Constitutional Convention, (United States, *Formation of the Union,* House Document No. 398, Sixty-Ninth Congress, First Session), p. 252.

Mr. King suggested that the Legislatures "might even devise the *modes of election* that would be subsersive to the end in view".

General Pinckney's motion to substitute election of the first branch in such *mode* as the Legislature should appoint,

instead of its being elected by the people was voted down, Massachusetts and New York voting in the negative. General Pinckney then moved that the first branch be elected *by the people in such mode as the legislature should direct;* but waived it on its being hinted that such a provision might be more properly tried in the detail of the plan (*ibid.*, p. 254).

On Monday, August 6th the Committee of Detail made its report. Article IV, Section I read as follows:

> "The members of the House of Representatives shall be chosen every second year, by the people of the several states comprehended within this Union. The qualifications of the electors shall be the same, from time to time, as those of the electors in the several states, of the most numerous branch of their own legislatures."

The report also proposed Article VI, Section 1 as follows:

> "The times, places and manner of holding elections of the members of each house shall be prescribed by the legislature of each state; but other provisions concerning them may, at any time be altered by the Legislature of the United States."

Messrs. Pinckney and Rutlidge moved to strike out "but other provisions concerning them may, at any time be altered by the Legislature of the United States". Mr. Madison argued the question at length. He objected to giving the legislatures "the *uncontrolled* right of regulating the times, places and manner of holding elections". Further changes were agreed on following which Article VI, Section 1 "as thus amended was agreed to *nem con*" (Ibid, pp. 510, 511).

On September 7th, 1787 the entire matter was referred to a Committee of five to revise. This Committee was known as Committee on Style. That Committee reported on September 12th a digest of the plan of which printed copies were ordered to be furnished to the members (Formation of the Union, p. 702). This plan proposed the following language for Section 4 of Article I:

"The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations" (Ibid, p. 704).

The words "except as to the places of chosing senators" were added to the end of the 1st clause of Article I, Section 4 "in order to exempt the seats of government in the states from the power of Congress" (Ibid, p. 721).

We find no record of further discussion in respect of the precise language used in Section 4 of Article I except the statement of Mr. Garey at page 738 that he objected to "the power of Congress over the *places* of election".

The framers of the Constitution obviously believed it essential that the elections should be at such a *time* that the people would find it convenient to vote; that they should be at such a *place* as the people might find it convenient to reach; and that the representatives should be elected either at large or in districts, whichever *mode or manner* the legislature representing the people of the state might prefer. X

Following the adoption of the Constitution, New York by Chapter XI of 1789 passed January 27th of that year, divided the State into six Congressional Districts, and directed the first election to be held the first Tuesday in March and thereafter in April every second year.

In New Jersey, on the other hand, the legislature provided for the election of representatives at large by Chapter CCXLI November 21, 1788.

In North Carolina, the legislature by Chapter XVII of 1792, divided the state into ten Congressional Districts.

In Virginia, the legislature by an Act of November 20, 1788, directed the election of one representative in Congress from each of ten Congressional Districts, and ordered the voters to assemble at the County Court House on February 2nd.

On June 17, 1790 the New Hampshire Legislature passed "An Act Directing the Mode of Choosing Representatives in

X Tucker's "Blackstone" 1803 Vol. I, pp. 191-1

Congress". We are unable to state the substance of the Act because no laws were published for the Session of 1790 and 1791.

In Pennsylvania the legislature by an Act of August 4, 1788, Chapter CLVII directed the time, places and manner of holding elections for representatives and for appointing electors. The time for electing representatives was fixed as the last Wednesday of November. The time for electing electors was fixed as the first Wednesday of January. The Act provided for the election of ten representatives at large and ten electors at large.

In South Carolina the legislature by the Act of November 4, 1788 provided for five districts, each to have one representative, the election to be held at the "time and places" for the election of state representatives.

In Maryland, Chapter XVI of the Laws of 1790, established six districts for the election of representatives and electors and fixed the first Monday of October in every second year for the election.

In Connecticut the legislature, on the first Thursday of January, 1789, passed "An Act for Regulating the Election of Senators and Representatives for this State in the Congress of the United States", providing for five representatives at large.

This Court in *McPherson* vs. *Blacker,* 146 U. S. 1, has pointed out the various ways in which the presidential electors were provided for in the various states.

And as late as 1842 when Congress passed an act requiring the election of representatives in Congress in districts, four states (New Hampshire, Missouri, Mississippi and Georgia) defied the law and continued to elect their representatives in Congress at large.

To avoid this confusion, Congress directed that all representatives be elected on the Tuesday after the first Monday in November, in every even numbered year (R. S. 25; March 3, 1875, c. 130, § 6, 18 Stat. 400) and beginning in 1842 has, in a series of apportionment acts directed the election of representatives by districts.

When the Constitution was under discussion and adopted in its present form, the delegates to the Convention knew that in the State of Massachusetts the Governor had a veto power over all legislative activity and that in New York a Council of Revision had a veto power. They knew that in the remaining eleven states the legislature, (a bicameral body in every state except Pennsylvania), was supreme.

> "The only question really for determination is: What did the framers of the Constitution mean by requiring ratification by 'legislatures'. That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A legislature was then the representative body which made the laws of the people."
>
> *Hawke* vs. *Smith,* 253 U. S. 221 at p. 227.

It must be assumed that if the framers of the Constitution intended to delegate the power to say whether representatives in Congress should be elected at large or by districts to the "state", they would have said so.

A somewhat similar situation arose in connection with the election of electors. In respect of that subject matter the framers of the Constitution provided that "each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress" (Article II, Section 1, Cl. 2). This Court held in *McPherson* v. *Blacker* (146 U. S. 1) that under this provision the members of the bicameral body had the power themselves to appoint electors, and the insertion of the words "in such manner as the legislatures thereof may direct" operated as a limitation upon the State in respect of any attempt to circumscribe the legislative power.

In that case the question was whether the Legislature of the State of Michigan could direct that presidential electors be elected from districts coterminous with Congressional districts or whether they must be appointed at large. On the

one hand, it was claimed that since the appointment was made by the State, it was required to act as a political entity on each elector and the provision for election from districts was in violation of Article II, sec. 1, Cl. 2. In opposition thereto it was claimed that since the appointment was to be made as the Legislature directed, its discretion was unlimited. This Court in the course of its opinion said (p. 25):

> "The clause under consideration does not say that the people or the citizens shall appoint, but that 'each state shall'; and if the words, 'in such manner as the Legislature thereof may direct' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the State Constitution in that regard. *Hence, the insertion of these words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power cannot be held to operate as a limitation on that power itself*" (Italics ours).

That care was used in the selection of terms is evident from the language of Article 1, Section 8, Cl. 17. In that clause the framers of the Constitution provided that Congress shall have power "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, *by cession of particular states*, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the *consent of the Legislature of the State* in which the same shall be for the erection of forts, etc." Here the framers of the Constitution clearly had in mind the difference between property owned by the state and private property. As to property owned by the state, the Constitution requires *state* action. As to private property it requires the *consent of the Legislature.*

Section 3 of Article I confers upon the "Legislature" the power to choose Senators of the United States. Section 4 confers upon the "Legislature" the power to prescribe the times, places and manner of electing Senators. *In the same*

sentence the "Legislature" is given power to prescribe the times, places and manner of electing Representatives in Congress. The word "Legislature" could not have been used by the framers of the Constitution in two different senses in the same sentence. The "Legislature" referred to in Section 3, Article I is the same "Legislature" which is referred to in Section 4 of Article I. It is inconceivable that the framers of the Constitution intended to exclude the executive when they authorized the "Legislature" to choose Senators, and at the same time to include him when they gave that same body power to determine the times, places and manner of their election. Unless it can be said that the Constitution gave the executive a voice in fixing the time, place and manner for electing United States *Senators,* it cannot possibly be said that the Constitution gave the executive any voice in fixing the time, place and manner of electing *Representatives* in Congress.

The framers of the Constitution made use of the Congress, the Legislature, the Executive, the State, and did not fail to refer to "appropriate legislation by the State." Quoting from the opinion of D. J. Loevinger in *Smiley* v. *Holm* (*supra*):

> "Thus as the appropriate agency designated by the Federal Constitution the Legislature shall 'choose' Federal Senators, 'fill' Senatorial vacancies, 'prescribe' the time, place and manner of holding elections for Senators and Representatives, and 'direct' how the State shall appoint Presidential electors. In the same capacity the Legislature may 'apply' to the United States for protection against domestic violence, 'apply' to Congress to call a Constitutional Convention, 'ratify' an amendment to the Federal Constitution, 'consent' to the purchase of land from the State by the United States, 'consent' to the formation of a new state out of portions of its own territory.
>
> But if a criminal escape from one State to another, the State harboring him must deliver him upon the demand of the Executive of the State from which he fled (Article IV, Section 2, Cl. 3); if a vacancy occurs in representa-

tion from any State, the Executive authority shall call an election to fill it (Article I, Section 2, Cl. 4); if a vacancy occurs in the Senate, the Executive may make temporary appointments (Article I, Section 3, Cl. 2); if the Legislature cannot be convened, the Executive may ask for protection against domestic violence (Article IV, Section).

And by contrast, when a State cedes territory to the United States (Article I, Section 8, Cl. 17) or when it consents to surrender its equal representation in the Senate (Article V), it acts in its corporate or full legislative capacity. So must the original States have acted prior to 1808 when they admitted the importation of such persons as they 'thought proper'. Article I, Section 9. Each State reserves to itself authority to train and to appoint the officers of the State Militia (Article I, Section 8, Cl. 16). Amendment XVIII may be enforced by the State 'by appropriate legislation'. A State may ratify an amendment to the Constitution by a convention (Article V) as well as by the Legislature, although neither the State nor its Executive, nor a Convention, but only 'the Legislature' may request that amendments be proposed. On the other hand, the restrictions or prohibitions put upon a State are never directed to its Legislature or its Executive but upon the State in its entire corporate capacity."

We respectfully direct attention to the entire opinion disclosing careful research and thought of Mr. Justice Loevinger, District Judge of Minnesota, in *Smiley* v. *Holm*, published in the Congresional Record on January 14, 1932, pages 2040-45.

The delegates to the Convention which adopted the Constitution would not have voted in favor of a proposition giving the Executive of each and every state a veto over Federal legislation. The proposal to given even the President a veto power was strenuously combated before final adoption.

Benjamin Franklin expressed himself vigorously against the grant of any veto power to the President. He said:

"He had had some experience of this check in the Executive on the Legislature, under the proprietary Gov-

ernment of Pennsylvania. The negative of the Governor was constantly made use of to extort money. No good law whatever could be passed without a private bargain with him."

(Madison's Notes—United States—Formation of the Union, p. 148.)

"Mr. Sherman was against enabling any one man to stop the will of the whole. No one man could be found so far above all the rest in wisdom. He thought we ought to avail ourselves of his wisdom in revising the laws, but not permit him to overrule the decided and cool opinions of the Legislature" (Ibid, pp. 148, 149).

Colonel Mason supported the view of Dr. Franklin (*Ibid* p. 150).

Mr. Bedford argued:

"That no check was necessary on a Legislature * * * with two branches" (Ibid, p. 94).

Mr. Frothingham in "A Brief History of the Constitution and Government of Massachusetts" (1915), at page 16 makes the following observation:

"It is curious to note the decline of the Colonial Governor's power and the usurpation of his authority with the Assembly * * * Under the original Constitution of the States the powers of the Assembly were made paramount and numerous checks placed upon the authority of the Governor."

Counsel for appellee in *Hawke* vs. *Smith, supra,* contended that:

"The term 'legislature' in Article I, Section 4 of the United States Constitution comprehends the entire legislative power of the State; and as so used, includes not only the two branches of the general assembly, but the popular will as expressed in the referendum provided for in Sections 1 and 1(a) of Article II of the Ohio Constitution."

See argument of counsel 253 United States, page 224.

This Court, per Mr. Justice Day, rejected the argument in the following statement (p. 227):

> "A legislature was then the representative body which made the laws of the people."

In *Hawke* v. *Smith, supra,* this Court held that the word "Legislature" in Article V of the Federal Constitution dealing with amendments to the Constitution, refers to the bicameral body; that an amendment to the Constitution of the United States ratified by the Legislature was valid and effective without submission to or approval by the Governor of the State and without submission to or approval by the people of the State by a referendum vote pursuant to the Constitution of the State of Ohio.

In *Davis* v. *Hildebrandt,* 241 U. S. 565, this Court held that the Congressional Act of August 8, 1911 required the states to be re-districted according to state laws rather than —as had, in previous apportionment acts been provided—by the State legislatures; that the Act of August 8, 1911 was a valid and enforcible Act of Congress pursuant to the provisions of Section 4, Article I of the Federal Constitution, and that therefore the attempted re-districting of the State of Ohio was ineffectual.

But the same fundamental question seems to have been inherent in that as in the instant case, viz.: in the absence of authorization by Congress, acting under the power conferred by Article I, Section 4, may the discretion of a legislature in prescribing the times, places and manner of holding elections for representatives in Congress be circumscribed by those provisions of a state constitution which regulates enactment of the laws for state governmental purposes. Congress had construed the term "legislature" as not meaning state law and had therefore substituted for the word "legislature", the words by "laws of the state". This court said (p. 568):

> "We think it is clear that Congress in 1911, in enacting the controlling law concerning the duties of the states, through their legislative authority, to deal with the subject of the creation of congressional districts, ex-

> pressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that whereby the state constitution and laws, the referendum was treated as part of the legislative power, the power thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law. This is the case since under the act of Congress dealing with apportionment, which preceded the Act of 1911, by Sec. 4 it was commanded that the existing districts in a state should continue in force until the legislature of such state, in the manner herein prescribed, shall redistrict such state (Act of Feb. 7, 1891, chapter 116, 26 Stat. at L. 735); while in the act of 1911 there was substituted a provision that the redistricting should be made by a state 'in the manner provided by the laws thereof',"

and again (p. 569):

> "In so far as the proposition challenges the power of Congress, as manifested by the clause in the Act of 1911, treating the referendum as a part of the legislative power for the purpose of apportionment, where so ordained by the state constitution and laws, the argument but asserts on the one hand, that Congress had no power to do that which, from the point of view of Sec. 4 of Article I, previously considered, the Constitution expressly gave the right to do."

Unless the Provision in Section 4, of Article I that "the Times, Places and Manner of Holding Elections for Senators and Representatives, Shall Be Prescribed in Each State *by the Legislature* Thereof" Was Intended to Limit the State Agency in Respect of These Matters to the "Legislature", It Was Surplusage.

Section 2 of Article I provides that "the House of Representatives shall be composed of members chosen every second year by the people of the several states".

Section 3 of Article I provides that "the Senate of the United States shall be composed of two Senators from each state, chosen *by the legislature* thereof".

In these two short sentences complete provision is made for the election of senators and representatives. The senators are to be elected by the "legislatures" of the states, the representatives by the "people" of the states. With nothing added, the states would have been free to regulate the election of senators and representatives as they saw fit by constitutional provision, or otherwise.X The framers of the Constitution were unwilling to grant this broad power to the states. It was provided that the electors for representatives in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature (Art. I, Sec. 2, Cl. 1); that a representative must be twenty-five years of age and have been a citizen for seven years and an inhabitant of the state from which chosen when elected (Art. I, Sec. 1, Cl. 1).

It was provided that a senator must be thirty years of age when elected and have been nine years a citizen of the United States, and an inhabitant of the state from which he shall be chosen at the time of his election.

It is obvious that the delegates to the Convention which framed the Constitution were unwilling to leave the regulation as to the time, place and manner of electing senators and representatives to the states as such. They were insistent that these regulations be made by the "Legislature", as distinguished from any other state power.

Messrs. Madison and Gouveneur Morris felt that the right of the legislatures to regulate the election of senators was involved in the "right of appointing them", and therefore moved to strike out "each house" and to insert "the House of Representatives" (United States—Formation of the Union, p. 509). The proposition "was disagreed to" (*Ibid*).

It is clear from what occurred that the framers of the Constitution were unwilling to assume anything in respect of this important matter. They were unwilling to assume that the legislatures would have the power intended, without any express provision to that effect. If the framers of the Constitution had intended that the state rather than the legis-

X. Federalist Vol II p. 82

lature, should have the power conferred upon the Legislature by Section 4 of Article I of the Constitution, but that Congress should always have the right by law to control the election of senators and representatives, except as to the places of choosing senators, the first phrase of Clause 1 is entirely unnecessary. The natural and simple and precise provision would have read:

> "Congress may at any time by law make or alter any regulations of any state in respect of the election of senators and representatives, except as to the places of choosing senators."

The framers of the Constitution did not use language unnecessarily. By seven words—"To establish post offices and post roads", they conferred a multitude of power on the Congress. In all of the seventeen subdivisions of Section 8, Article I, conferring jurisdiction on Congress, not one unnecessary word is used. It is impossible to believe that the framers of the Constitution inserted the first phrase of the 1st clause of Section 4 of Article I unnecessarily. Nor is it conceivable that in the light of the accuracy with which words and phrases were used by the framers of the Constitution that the word "Legislature" should have been used in Section 4 of Article I if the framers of the Constitution meant the "state" or anything other than the bi-cameral body referred to in Article V, and described by this court in *Hawke* v. *Smith* (*supra*).

POINT II.

The power conferred on the "Legislature" by the Federal Constitution may not be circumscribed by a State Constitution.

Article III, Section 1, of the New York State Constitution reads as follows:

> "The legislative power of this state shall be vested in the Senate and Assembly."

Section 14, Article III of the New York State Constitution provides that no law shall be enacted except by bill.

Section 9, Article IV, provides that every bill which shall have passed the Senate and Assembly shall, before it becomes a law, be presented to the Governor; if he approve he shall sign it; but if not, he shall return it with his objections to the house, in which it shall have originated. The Legislature may, by a two-thirds vote of the members elected, pass the bill as a law over the objections of the Governor.

It is contended by respondents that the resolution in question is invalid because the Legislature failed to act pursuant to the provisions of the New York State Constitution. If the Constitution of a state may *restrict* legislative action authorized by the Federal Constitution, it may, in effect, take the power from the Legislature and put it into a Constitutional Convention, the members of which may never become members of the Legislature. If the Constitution of a state may provide that to re-district a state into Congressional Districts, pursuant to Section 4, Article I of the Federal Constitution, the legislature must do so by a bill approved by the Governor or passed over his veto by a two-thirds vote, it may require a four-fifths vote, or a unanimous vote, or may provide that no apportionment shall be valid unless approved by the Governor. Some of the best minds of the country in the legislative halls and Constitutional Conventions have spoken against any such power in the state.

In the election case of the West Virginia members in the Forty-third Congress, a question arose as to the power of a State Constitutional Convention to fix the time for election of Representatives in Congress. The Majority Report held as follows:

> "What shadow of authority, therefore, was there in the convention to interfere? The State Constitution had not given to the legislature the power to say when Congressmen shall be elected (for it did not have it to give), and neither State Constitution nor State Convention could take it away. The legislature derived it from the supreme law of the land, the constitution of the United States, and in its exercise it knew but one master."
>
> Hind's Precedents, Vol. I, page 653.

> "In the case of Baldwin v. Trowbridge, in the Thirty-Ninth Congress, this House held that 'where there is a conflict of authority between the Constitution and the legislature of a State in regard to fixing the place of elections, the power of the legislature is paramount."
>
> Hind's Precedents, Vol. I, page 654.

In the Massachusetts Convention of 1820 to revise the State Constitution a resolution was submitted to limit the discretion of the legislature in prescribing "the times, places and manner" of the election of representatives in Congress. Mr. Austin proposed an amendment to the State Constitution for the election of representatives in such districts "as the legislature shall direct". The resolution was defeated.

In the debate, Justice Story, a member of the convention, opposed the resolution and declared that:

> "the fourth section of the first article of the constitution of the United States declares, 'that the times, places and manner of holding election for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators'. Here an express provision was made for the manner of choosing representatives by the state legislatures. They have an unlimited discretion in the

subject. They may provide for an election in single districts, in districts sending more than one, or by a general ticket for the whole state. Here is a general discretion, a power of choice. What is the proposition on the table? It is to limit this discretion, to leave no choice to the Legislature, to compel representatives to be chosen in districts. In other words, to compel them to be chosen in a specific manner—excluding all others. Was not this plainly a violation of the constitution? Does it not effect to control the Legislature in the exercise of its legitimate powers? Does it not interfere with the superintending authority of Congress? * * * Again, the second article and first Section of the Constitution of the United States provides, that 'each state shall appoint, in such manner as the *legislature* thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the Congress'. Here a discretion as to the choice of electors is given to the Legislature. It is unlimited, yet the proposition before us goes directly to destroy this freedom of choice, and compels the Legislature to resign all manner of choice but one. It assumes a control over the legislature which the constitution of the United States does not justify. It is bound to exercise its authority according to its own views of public policy and principle, and yet this proposition compels it to surrender all discretion. In my humble judgment, said Mr. S., and I speak with great deference for the Convention, it is a direct and palpable infringement of the constitutional provisions to which I have referred."

See In Congressional Library,

"Journal of Debates and Proceedings in the Convention of Delegates chosen to revise the Constitution of Massachusetts, begun and holden at Boston, November 15, 1820, and continued by adjournment to January 9, 1821." Reported for the Boston Daily Advertiser New Edition Revised and Corrected. Boston published at the office of the Daily Advertiser 1853.

Mr. Webster, following Justice Story, declared that:

"Whatsoever was enjoined on the legislature by the Constitution of the United States, the legislature was

bound to perform; and he thought it would not be well by a provision of this Constitution to regulate the mode in which the legislature should exercise a power conferred on it by another Constitution."

Hind's Precedents, Vol. I, page 653.

The election case of *Baldwin* v. *Trowbridge,* 2 Bart 46, decided by Congress, in the First Session of the 38th Congress, when the Majority Report (Report No. 13) was sustained by a vote of the House of 108 to 30, is directly in point. In *Schrader* v. *Polley* (26 S. D. 5), the court, with no judicial precedent as a guide, quotes extensively from and adopts the minority report, with not the slightest reference to the majority report nor to the determination of Congress thereon.

The case arose in Michigan. The State Constitution prohibited an elector from voting outside of the township or ward in which he resides and the question arose as to soldiers' votes thus prohibited by the Constitution.

The following quotation is from the Majority Report adopted with such great unanimity by the House:

"Here is an unmistakable conflict of authority. The constitution plainly prohibits what the legislature as plainly permits. The one authorizes the election to be held only in the township or ward—the other at military headquarters. The power to act at all in the premises, so far as concerns representatives in Congress, is derived from article one, section four, of the Constitution of the United States, which is as follows:

* * * * * * * *

"Here the power is conferred upon the legislature. But what is meant by 'the legislature?' Does it mean the legislative power of the State, which would include a convention authorized to prescribe fundamental law; or does it mean the legislature eo nomine, as known in the political history of the country? The committee have adopted the latter construction. At the time the Constitution of the United States was written, there existed in the thirteen States for which it was designed legislatures, created or restrained by some fundamental

> law, in the shape of charters or constitutions, very much as they exist in the several States now. With this fact before them, it is not probable that the framers of the Constitution, if they intended to confer this power upon State organic conventions, would have chosen some word less liable to misconstruction. It is also apparent, from the manner in which this word is used in other parts of the instrument, that its framers recognized a wide difference between a continuing legislature and a convention temporarily clothed with power to prescribe fundamental law."

The opinion of the court in *Schrader* v. *Polley* also cites *Shiel* v. *Thayer,* 2 Bart Contested Election Case 349, and misinterprets what was decided in this case. Mr. Dawes wrote the report in *Shiel* v. *Thayer* which did contain in its concluding sentences what Mr. Dawes admitted in the debate in *Baldwin* v. *Trowbridge* to be mere dictum representing only his personal views. The report in *Baldwin* v. *Trowbridge,* above quoted, was not in conflict with the decision in *Shiel* v. *Thayer.* In said debate (Congressional Globe, 1st Session—39th Congress, pp. 815-823) Mr. Marshall who wrote the Minority Report claimed that the Baldwin Report was in conflict. Mr. Dawes denied this, asked Mr. Marshall to yield, and said:

> "The State of Oregon had omitted entirely through its legislation eo nomine to prescribe any other time for the election of a member of Congress than that which had been prescribed in the Constitutional Convention at the origin of the State, which was itself a legislative body in very many respects, so that there is no conflict between the position here assumed by the committee and the position assumed by the committee in that case, though there may be a conflict in the language used in the report, for I admit that the language of the report of the committee goes to the full extent claimed by the gentleman from Illinois (Mr. Marshall) at this time" * * *

Mr. Scofield who wrote the Majority Report in *Baldwin* v. *Trowbridge,* interrupted to ask:

"Taking the Oregon case, for instance, is there in his judgment anything in the conclusions to which the committee came in that case that is at all in conflict with the logic used by the majority *of the Committee* of Elections in this case?"

And Mr. Dawes answered there was not.

In support of the Majority Report in *Baldwin* v. *Trowbridge,* Representative Fernando C. Beaman of Michigan delivered the principal speech, a scholarly and convincing exposition of the principles involved, to which special attention is respectfully directed (Cong. Globe, 1st Session, 39th Congress, p. 815). One brief quotation here follows:

"A Representative in Congress, then, is not a State officer. He is not a creature of the State, but of the National Government. The Legislature, in providing the times, places and manner of elections of Representatives, does not derive its authority from the people of the State through their Constitution, but from the Constitution of the United States. This delegation of power is not in terms conveyed through the people of the State, nor the Constitution of the State, but it is conferred directly upon the Legislature. The power is not simply permissive, but mandatory; and it is of the most plenary character, subject only to the control of Congress. * * * If the act is repugnant to the Constitution of the State as it respects the places of election of State Officers * * * then to that extent it is undoubtedly void. If it is framed in pursuance of and in accordance with the Constitution of the United States in regard to the election of Representatives in Congress, then to that extent it is just as clearly valid."

In *Sapp* and *Carpenter* cases, (House Report No. 19, 30th Session 46th Congress, 1 Hinds Precedents, p. 672, 1 Ellsworth, p. 322) it was further said:

"We disregard altogether the provision for the election of members of Congress found in Sec. 7, Art. 12 of the Constitution of Iowa. That provision may tend to show that it was the intention of the people of Iowa

that members of Congress should be elected on the second Tuesday in October of the even numbered years not Presidential, but the time of electing members of Congress cannot be prescribed by the Constitution of a State, as against an act of the legislature of a State or an act of Congress."

The *Sapp* and *Carpenter* cases, like the Oregon case, related to State constitutional provisions adopted with the admission of new States in the Union. But such constitutional provisions resulted from enabling acts of Congress, as necessary as they were exceptional as there could be no legislature until the state was admitted, and were only of a temporary nature. The Sapp and Carpenter Majority Report further states:

"The only apparent exception has been in the constitutions which have been formed by territories, and with which such territories have been admitted into the Union as States; but this, if it be a valid exception, does not prove that territories have the right by a constitution to fix the time for electing Representatives in Congress when they become States; but the authority of these provisions rests on the sanction and adoption of them by Congress in admitting such territories as states with constitutions containing such provisions."

In Kentucky election case of *Davidson* v. *Gilbert* in the 56th Congress, it was held (Hind's Precedents, Vol. 1, p. 180):

"The claims of the contestant that the act was contrary to the State constitution, and that it had never properly passed the legislature, are dismissed by the committee without discussion as having no foundation."

In *Perkins* v. *Morrison*, the Commitee Report (Report No. 8, 31st Congress, 2nd Session) held as follows:

"By the constitution of the United States, the right to prescribe the times, places, and manner of holding elections for representatives in each State is declared to be in the legislature thereof, subject to the superior power

of Congress to make or alter such regulations by law. That power, however, Congress has never exercised, until it was partially exerted by the second section of the act of June 25, 1842, to which reference has already been made. *Limited only, therefore, by the provisions of that section* (italics ours), the legislature of New Hampshire had plenary power to prescribe by what districts the elections should be made, and to change the boundaries of those districts at its pleasure, and at any time. *No constitutional provision, now law of Congress, restrains this right originally to form, or subsequently to alter the limits of congressional districts, at the discretion of the State legislature.*" (Italics ours.)

The "Burton amendment" to the apportionment act of August 8, 1911 substituting the expression "provided by the laws thereof", for the expression "by the legislature thereof" offered to cover the Ohio referendum law, was adopted upon the argument of Senator Burton who directed attention to the obvious meaning of the term "legislature". The debate (Congressional Record, Vol. 47, Part 4, 67th Congress—pp. 3436-7 and p. 3507) indicates that Senator Burton's attention had not been called to the identical use of the term legislature in the Constitution. A previous bill from the House had read "by the laws of the State", and he had noted that the new bill substituted the phrase "by the legislature thereof." But he had no doubt of the meaning of "legislature". And Congress by its act upheld his contention.

This was not the first attempt in Congress to recognize the laws of the States in the creation of congressional districts. When, in 1842, the bill to require representatives to be elected by districts was before the 27th Congress, the judiciary committee of the Senate reported an amendment as follows:

> "and the election in such State shall, under the laws thereof, be made by districts, such districts shall be composed of contiguous territory," etc.

This amendment was defeated by a vote of 40 to 4 (Congressional Globe, 2d Session 27th Congress, p. 536).

POINT III.

Resort to the doctrine of practical construction, if proper at all in the case at bar, does not support respondents' contention that the word "Legislature" in Section 4 of Article I of the Constitution of the United States, means the "State".

Respondents contended in the court below that the uniform practice of "one hundred and forty years" has established the meaning of the word "Legislature" as used in Section 4 of Article I as synonymous with "State" or "law making power of the State". At the outset it should be noted that there has been no uniform practice for a period of one hundred and forty years. In 1788 the Governor of Massachusetts was the only executive having a veto power. In New York a Council of Revision had a veto power. It was not until after the adoption of the Constitution that the veto power in executives was—and slowly—adopted by other states. Georgia conferred a veto power on its Governor in 1789; Pennsylvania followed in 1790; Connecticut in 1818; New Jersey in 1844; South Carolina in 1865; Virginia in 1870; Maryland in 1876; Delaware in 1897; Rhode Island in 1909. North Carolina has never given its executive a veto power.

Massachusetts in 1788 (November 17, 1788), and again in 1792 (June 7, 1792), divided the state into Congressional districts by resolution. True it is that these resolutions appear to have been submitted to John Hancock then the Governor of Massachusetts, pursuant to the provisions of the constitution of that State.

See

Mass. Resolves 1788 p. 53;
Mass. Resolves June 1792 p. 25.

At that time the practice was to treat legislative matters by "enactments". The first ten amendments to the Constitution of the United States were ratified by the State of New York by "An Act" approved by the Council of Revision February 27th, 1790. Massachusetts did not ratify the first ten amendments to the Constitution, but ratified the Eleventh Amendment by an act of June 26th, 1794, approved by the Governor. Pennsylvania ratified the Eleventh Amendment in 1791 by an act approved by Governor Mifflin of that state.

Massachusetts, by an act of June 28th, 1798 provided for the cession of Castle Island and granting "The consent of this state for the purchase by the United States of Governors Island from private parties, both being in the Harbor of Boston". Massachusetts correctly provided *by a State law* for the cession of Castle Island because it was apparently state property; but unnecessarily used a state enactment for granting its consent to the sale of private property under Article I, Section 8, Subdivision 17. As we have pointed out above, where the state ceded its property a state law was necessary. Where the United States sought to buy private property within the boundaries of the state, the *consent* of the "Legislature" was required.

But this form of procedure was entirely without significance because there was no necessity for acting otherwise. As late as the year 1919 the State of Minnesota ratified the Eighteenth and Nineteenth Amendments by an act approved by the Governor. (Minnesota Sessions Laws 1919, p. 765; also Minnesota Special Session Laws of 1919, p. 105).

Where the Court has reached the conclusion that a practice relied on has been wrong, it has not hesitated to reject the practice as being in violation of the statute or constitutional provision under consideration.

Matter of Wendell vs. *Lavan*, 246 N. Y. 115;
People vs. *Tremaine*, 252 N. Y. 27.

What the framers of the Constitution intended by the word "Legislature" as used in Section 4 of Article I, cannot

be changed by a practice adopted by the states thereafter; for obviously, that practice may have been in direct conflict with what the framers of the Constitution intended. The attitude of the states in respect of this particular section caused considerable difficulty and discussion. Many of the states in ratifying the Constitution insisted upon an amendment of Section 4 of Article I, which would strike out the power reserved in Congress to overrule legislative regulations in respect of the election of representativs in Congress.

See

United States—Formation of the Union, pp. 1018, 1019, 1023, 1025, 1033, 1038, 1050, 1055, 1056.

The New York State Convention enjoined upon their representatives in Congress to exert all their influence and use all reasonable means to obtain a ratification of amendments to the Constitution including one, that the Congress shall not make or alter any regulation in any state respecting the times, places and manner of holding elections for Senators or Representatives unless the Legislature of such State shall neglect or refuse to make laws or regulations for the purpose, or from any circumstances be incapable of making the same, and then, only until the Legislature of such state shall make provision in the premises; provided that Congress may prescribe the time for the election of representatives (*ibid*, pp. 1039 and 1040).

But the Congress has consistently refused to propose any such amendment to the Constitution, and the Constitution never has been amended in respect of Section 4 of Article I. It reads today just as it read when it was adopted in 1787.

In *Louisville & Nashville R. R.* v. *Kentucky*, 161 U. S. 677, 690, this Court said:

> "While the doctrine of contemporaneous construction is doubtles of great value in determining the intentions of parties to an instrument ambiguous upon its face, yet, to justify its application to a particular case, such contemporaneous construction must be shown to have

been as broad as the exigencies of the case require. * * * As is said by Mr. Justice Cooley, in his Constitution Limitations (6th Ed.), page 85: "A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibition, without the mischief which the Constitution was designated to guard against appearing, or *without anyone being sufficiently interested in the subject to raise the question;* but these circumstances cannot be allowed to sanction a clear infraction of the Constitution'."

The language used by Mr. Justice Cooley, quoted by this Court, might well have been written with respect to the question now before it. The Constitution of the United States provides that the Legislatures shall execute a certain function. It detracted nothing from their acts that the Legislatures performed their duty in a particular form. When the Legislatures made provision for the election of representatives in Congress all interest ceased. Neither the Congress of the United States nor the people were concerned with the precise way in which the Legislature acted.

Judge Pound, writing for the Court of Appeals (New York) in *People* vs. *Tremaine* (252 N. Y. 27), at page 47, in language almost prophetic of the present controversy, states the rule in the following language:

"Now comes a serious conflict between the executive and administrative officers and the Legislature by reason of appointments amounting to a substantial encroachment by the latter upon the powers of the former. General acquiescence in a custom which, all things considered, may not have resulted in a harmful violation—or indeed, any violation—of the Constitution, does not preclude a contest when substantial rights are insisted upon (Los Angeles v. Los Angeles City Water Co., 177 U. S. 557, 579). In times of peace and harmony constitution rights are not asserted. When a crisis presents itself the Constitution is invoked and when a justifiable question is presented to the courts they must decide it."

Neither practice nor intentions can modify the express provisions of the Constitution.

Wendell v. *Lavan*, 246 N. Y. 116, page 120.

After submitting redistricting acts to executives in States where executives had power of veto for many years, the legislatures of three states (New York, Minnesota and Missouri) unable to agree with the executives of those States, have asserted the right to act independently of the executive.

If, as we contend, they always had this right, they necessarily have the right and the power now to assert it.

A similar question was presented to this court in *McPherson* vs. *Blacker, supra.* In that connection this Court (at p. 35) called attention to a report made by Senator Morton, Chairman of the Senate Committee on Privileges and Elections, on the 28th of May, 1874, and quoted from that report, apparently with approval, the following:

> "'The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many states; and it is no doubt competent for the legislature to authorize the governor, or the supreme court of the State, or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the states by the Constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect Senators of the United States. *Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.*' Senate Rep. 1st Sess. 43d Cong. No. 395." (Italics ours.)

POINT IV.

The Act of Congress of August 8, 1911, Chapter 5, 37 Stat. L. 13, was limited to the apportionment therein made and expired with the apportionment made pursuant to the Act of June 18th, 1929.

A temporary statute is one limited in duration at the time of its enactment, either expressly or by force of its character.

> 26 A. & E. Enc. of Law, page 534, citing 1 Bouv. inst. 112;
> *People ex rel. Smiley* v. *Holm,* 238 N. W. 494.

The apportionment Act of August 11, 1911, was clearly intended to be and actually was limited to the apportionment therein made, as was every apportionment act prior thereto with the exception of the Act of Congress effective May 23rd, 1850, providing for the Seventh Decennial Census and the apportionment of Representatives in Congress thereunder and similarly for subsequent apportionment to follow each decennial census (9 Stat. L. 433).

In accordance with the provisions of the Federal Constitution, the census of the population of the United States was had in 1790, following which Congress passed its first apportionment act, effective April 14, 1792 (1 Stat. L. 253). This was a very brief act, consisting of but one short paragraph, conforming to the requirements of the Constitution.

Following the censuses of 1800, 1810, 1820 and 1830, Congress passed apportionment acts (2 St. L. 128, 2 St. L. 669, 3 St. L. 651, 4 Stat. L. 516), all substantially the same as each of the preceding acts except as to the number of Representatives.

Following the census of 1840 Congress passed its sixth apportionment act (5 Stat. L. 491). It decreased the number of Representatives. It consisted of two paragraphs, the first

being substantially the same as the preceding apportionment acts except the basis of representation. Section 2 of the Acts of 1842 provided

> "That in every case where a state is entitled to more than one Representative in Congress the number shall be elected by districts composed of contiguous territory equal in number to the number of representatives to which such state may be entitled, no one district to be entitled to more than one representative."

By the Act of Congress effective May 23, 1850 (9 Stat. L. 433), provision was made for taking the seventh decennial census. The Act was similar in form to Exhibit A attached to the petition, being the Act of June 18, 1929. It was the first time and the only time other than by the Act of June 18, 1929, that Congress provided for taking the census and determining the representation in Congress in the same Act. This was the seventh apportionment act. This act contained no regulation such as was contained in the Act of 1842 with respect to the election of Representatives in Congress by districts composed of contiguous territory.

Following the census of 1860 Congress enacted its eighth apportionment act, increasing the number of Representatives (12 Stat. L. 353). It contained no provision for subdividing the states into Congressional Districts.

Following the census of 1870 Congress enacted its ninth apportionment act (17 Stat. L. 28). By that act the number of Representatives was increased. The act provided that Representatives in Congress should be elected by districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants. It also provided for the election of Representatives by the people at large where a state had been assigned an increased number of Representatives. It also fixed the first Tuesday after the first Monday in November, beginning with the year 1876, as the day for electing Representatives in Congress, this provision being subsequently carried into the Revised Statutes as

a permanent law. It also provided for a method of filling vacancies on account of death or resignation in Congress. It also provided for the enforcement of the Fourteenth Amendment.

Following the census of 1880 Congress enacted its tenth apportionment act (22 Stat. L. 5). It provided that Representatives in Congress should be elected by districts composed of contiguous territory containing as nearly as practicable an equal number of inhabitants. It increased the number of Representatives and made provision for the election at large of an increased number of Representatives in any state and provided that

> "If the number hereby provided for shall in any state be less than it was before the change hereby made, then the whole number to such state hereby provided for shall be elected at large unless the legislature of said state has provided or shall otherwise provide before the time fixed by law for the next election of representatives therein."

That Congress intended this law to be temporary in character is evidenced or by its title and from the fact that all of these provisions to which we have referred are limited by the words *"under such apportionment"*.

Following the census of 1890 Congress enacted its eleventh apportionment act (26 Stat. L. 735). It increased the number of Representatives. It contained substantially the same provisions as the Act of 1882. Following the census of 1900 Congress enacted its twelfth apportionment act (31 Stat. L. 733). It increased the number of Representatives. It contained substantially the same provisions as the two preceding acts, both with regard to laying out the states into Congressional Districts and electing representatives at large.

It contained a provision that

> "If the number hereby provided for shall in any state be less than it was before the change hereby made, then the whole number in such state hereby provided for shall be elected at large, unless the legislatures of the said

states have provided or shall otherwise provide before the time fixed by law for the next election of representatives therein."

and again made it clear that all of these provisions were *"under that apportionment"*.

Following the census of 1910 Congress enacted the thirteenth apportionment act (37 Stat. L. 13), and increased the number of Representatives to 435. This act contained the same provisions with regard to laying states out into Congressional Districts composed of contiguous territory of fairly equal population as the preceding acts. That act, which is the Act of August 8, 1911, again made it clear by its title and by its express terms, that all of these regulations had to do with the election of Representatives in Congress *"under this apportionment"*.

No apportionment of Representatives in Congress was made by the Congress of the United States following the census of 1920. It was evident to Congressional leaders that the House of Representatives, then composed of 435 members, had become unwieldy. It was felt that the membership should not be increased. It was, however, obvious that a reapportionment of the 435 Representatives among the states following the census of 1920 would mean an increased number of Representatives in some states and a decreased number in other states. Representatives in those states which were threatened with a decreased number were unwilling to assent to any proposition which would have that effect. Despite many efforts made by Congressional leaders no apportionment act was passed by Congress following the 1920 census, and consequently the 1911 apportionment remained in force.

Congress finally concluded to return to the solution found in the seventh Congressional Apportionment Act which became effective May 23, 1850 (9 Stat. L. 433). It was not known prior to the census of 1930 just how the 435 representatives in Congress might be apportioned. It was believed

at that time, to illustrate, that New York State would lose one representation. (See Debate in the House on Amendment offered by Congressman Reed, Congressional Record, pp. 2443, *et seq.*, Seventy-first Congress, 1929). Congress finally enacted the Law of June 18, 1929, which, in effect, apportioned to the various states a total of 435 representatives in Congress in the manner and form by that Statute provided, as a result of which New York State gained two seats in the House. Eleven states in all gained seats while twenty-one states lost seats in the House. The largest gain was by California of nine sets. The largest loss was by Missouri of three seats.

It is obvious from this historical review of the action of Congress following each census, with the exception of the census of 1930, that the apportionment acts thus enacted were intended to be temporary statutes limited by its title and express terms to the instant apportionment until the next census and the apportionment of representatives thereunder, by a new apportionment act.

Congress failed in 1929, as it did in 1850 by the Act effective May 23, 1850 (9 Stat. L. 433), to do more than was done by the first five apportionment acts, namely, to apportion to the various states of the Union the number of representatives to which each state shall be entitled in the Seventy-third and succeeding Congresses of the United States, leaving it entirely to the legislatures of the various states to provide for the election of these representatives in Congress in accordance with the provisions of Section 4 of Article I of the Constitution.

Nor was the situation changed by the inclusion of the Act of August 8, 1911, in the Code of Laws of the United States, where it was incorporated in Title 2 of the Code of Laws, Sections 2, 3, 4 and 5.

The Code of Laws of the United States is entitled "An Act to Consolidate, Codify, and Set Forth General and Permanent Laws of the United States in force December Seventh, One Thousand Nine Hundred and Twenty-five" (Chap. 713,

44 Stat. 773). Section 2 of Title 2 of the Code of Laws was identical with Section 2 of the Act of August 8, 1911, except that it included the two representatives from the newly admitted states of Arizona and New Mexico. It apportioned to the various states the number of representatives enumerated. Section 3 of Title 2 was Section 3 of the Act of August 8, 1911, and included the same language exactly as in the original Act "that in each state entitled *under this apportionment* to more than one representative" they shall be elected by compact and contiguous districts of fairly equal population.

Section 4 of Title 2 of the Code of Laws is Section 4 of the Act of August 8, 1911, and repeats the language of the Act "that in case of an increase in the number of representatives in any state *under this* apportionment" such additional representatives shall be elected in districts now prescribed by law until such state shall redistrict in the manner provided by the laws thereof. It is *conceded* that Sections 1 and 2 of the 1911 Act are no longer in force. Unquestionably Sections 3 and 4 have likewise expired.

The codifiers did not intend to change the provisions of the Act of August 8, 1911, nor did they have any power to do so. Section 2 (a) of the Act of Congress under which the codification was made (Chap. 713, 44 Stat. 773) provides as follows:

> "but nothing in this action shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments."

Nor does the Code of Laws pretend to include only laws which are both "general" and "permanent". It includes laws permanent but *local* as well as laws general but temporary.

Title 3, Ch. 3, dealing with "White House Police" is illustrative of a permanent but local law.

It was urged below that the debate in Congress on the amendment proposed by Congressman Reed of New York to the act of June 18, 1929, supports the contention that that law is still in force.

It is too well settled to require citation of authority that debates of members of a legislative body are not appropriate sources of information to discover the meaning of the language of the statute.

But if this debate be examined it will be found that the ruling of the chair was directly contrary to the inference drawn by respondents.

The Act of June 18, 1929, was before the House for discussion in June, 1929. There had been no redistricting of the State of New York for many years. The census of 1930 confirmed what was generally known, that the shifting of population had created grossly disproportionate districts. One Congressional District the 12th contained only 90,671 of population; Cong. Dir. January, 1932 (p. 72); the 23d Congressional District contained a population of 688,454. *Ibid* (p. 75) the 2nd District contained 776,425 (p. 69); the 1st, 637,002 (p. 69); the 8th, 799,407 (p. 71); the 13th, 111,696 (p. 73); the 14th, 119,794 (p. 73); the 15th, 121,675 (p. 73); Cong. Dir. January, 1932 (p. 72).

Congressman Reed sought to so amend the Act then under discussion, which dealt with an apportionment of representatives in Congress to be made following the 1930 census, *as would in effect,* amend the law of August 8, 1911, so as to permit his State (of New York) to *immediately* redistrict the State under that (1911) apportionment *for the Seventy-second Congress.*

The amendment was ruled out of order, and the Chair, in so ruling, specifically pointed out as follows (Congressional Record, Seventy-first Congress, First Session, June 6, 1929; Vol. 71, No. 42, p. 2445):

"In addition, the Chair calls attention to the language of the Act of August 8, 1911, in Section 4:

> That in case of an increase in the number of representatives in any State under this apportionment, such additional Representative or Representatives shall be elected—

"And so forth. And to the language in Section 3:

> That in each state entitled under this apportionment to more than one Representative—

"And so forth.

"All the way through every provision of the act of August 8, 1911, relates to 'this apportionment'; that is, the apportionment provided for in the act of August 8, 1911.

"Therefore, it seems to the Chair very clearly that the amendment offered by the gentleman from New York (Mr. Reed) is not germane to the pending bill; and the Chair sustains the point of order."

It will be noted that the Chair in ruling the amendment out of order specifically and clearly called attention to the fact that the Act of August 8, 1911 related to "this apportionment"; that is the apportionment provided for in the Act of August 8, 1911, *and to no other*. If any inference is to be drawn from the debate and the ruling of the Chairman, it is that the Chair recognized that the Act of August 8, 1911 was limited to the Apportionment of 1911 and would expire with the apportionment about to be made by the Act of 1929 then under discussion.

Nor can the Act of 1911 be applied to the present situation. On August 8, 1911, New York was divided into 37 Congressional districts. By Ch. 890 Laws (N. Y.) 1911, which repealed all prior apportionment acts the State was divided into 43 districts. It is impossible at this time to restore the 37 districts as they existed on August 8, 1911. If we could, it would be necessary to elect 8 representatives at large instead of 2 as directed by the Court of Appeals.

CONCLUSION.

It is respectfully submitted that the order and judgment should be reversed and the case remanded to the State Court with instructions accordingly.

Respectfully submitted,

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APPENDIX.

37 St. [illegible]

Chap. 5. An Act for the apportionment of Representatives in Congress among the several states under the Thirteenth Census.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That after the third day of March, nineteen hundred and thirteen, the House of Representatives shall be composed of four hundred and thirty-three Members, to be apportioned among the several States as follows:

Alabama, ten.
Arkansas, seven.
California, eleven.
Colorado, four.
Connecticut, five.
Delaware, one.
Florida, four.
Georgia, twelve.
Idaho, two.
Illinois, twenty-seven.
Indiana, thirteen.
Iowa, eleven.
Kansas, eight.
Kentucky, eleven.
Louisiana, eight.
Maine, four.
Maryland, six.
Massachusetts, sixteen.
Michigan, thirteen.
Minnesota, ten.
Mississippi, eight.
Missouri, sixteen.
Montana, two.
Nebraska, six.

Nevada, one.
New Hampshire, two.
New Jersey, twelve.
New York, forty-three.
North Carolina, ten.
North Dakota, three.
Ohio, twenty-two.
Oklahoma, eight.
Oregon, three.
Pennsylvania, thirty-six.
Rhode Island, three.
South Carolina, seven.
South Dakota, three.
Tennessee, ten.
Texas, eighteen.
Utah, two.
Vermont, two.
Virginia, ten.
Washington, five.
West Virginia, six.
Wisconsin, eleven.
Wyoming, one.

Sec. 2. That if the Territories of Arizona and New Mexico shall become States in the Union before the apportionment of Representatives under the next decennial census they shall have one Representative each, and if one of such Territories shall so become a State such State shall have one Representative, which Representative or Representatives shall be in addition to the number four hundred and thirty-three, as provided in section one of this Act, and all laws and parts of laws in conflict with this section are to that extent hereby repealed.

Sec. 3. That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be

elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

Sec. 4. That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed.

Sec. 5. That candidates for Representative or Representatives to be elected at large in any State shall be nominated in the same manner as candidates for governor, unless otherwise provided by the laws of such State.

Approved, August 8, 1911.

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CHARLES ELMORE

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1931.
Docket No. 731.

SAMUEL S. KOENIG, JOHN J. KNEWITZ and
WILLIAM L. WARD,
Petitioners,

against

EDWARD J. FLYNN, Secretary of the State of New York,
Respondent,

and

JAMES A. FARLEY, CHAIRMAN OF THE DEMOCRATIC STATE COMMITTEE,
Intervenor-Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of New York.

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STATEMENT OF PERTINENT FACTS

Petitioners herein seek to review the determination of the highest court of the State of New York on a question involving the subdivision of the State of New York into districts for the purpose of the election of Representatives to the House of Representatives of the Congress of the United States. The Court of Appeals of the State of New York has determined that such action must be accomplished in the form of statutory enactment and not, as attempted, by concurrent resolution, without gubernatorial sanction; that Chapter 890 of the Laws of 1911 of New York governs, except for two additional Congressmen at large, and that said concurrent resolution is ineffective to repeal said statute.

The Constitution of the State of New York is silent on the manner in which the function of fixing the boundaries of Representative districts for Congressional elections shall be exercised. In this respect, it differs from the constitutions of Minnesota, Utah, Virginia and others containing such provisions. (Virginia Constitution, Section 55; Utah Constitution, Section 1, Article 9; Minnesota Constitution, Article 4, Section 23). The New York Constitution does deal with the manner of the subdivision of the State into districts for its own State legislative bodies. In doing so, the New York State Constitution lays down certain reasonable rules of conduct which govern the said districting (Article III, Sections 4 and 5).

From the beginning of its history up to April 10, 1931, the districting of New York State for Congressional representation has invariably been accomplished by statutory enactment:

Laws of 1789, Chap. 11,
Laws of 1792, Chap. 5,
Laws of 1797, Chap. 62,
Laws of 1801, Chap. 64,
Laws of 1802, Chap. 72,
Laws of 1804, Chap. 19,
Laws of 1808, Chap. 170,
Laws of 1812, Chap. 120,
Laws of 1818, Chap. 126,
Laws of 1821, Chap. 84,
Laws of 1822, Chap. 250,
Revised Statutes, Part I, Chap. II,
Title III, Laws of 1832, Chap. 334,
Laws of 1842, Chap. 325,
Laws of 1851, Chap. 499,
Laws of 1862, Chap. 454,
Laws of 1872, Chap. 619, (Passed over Governor's veto),
Laws of 1873, Chap. 798,
Laws of 1883, Chap. 424,
Laws of 1892, Chap. 295,
Laws of 1901, Chap. 591,
Laws of 1902, Chap. 298,
Consolidated Laws, Chap. 57,
(Chap. 298, Laws of 1909),
Laws of 1911, Chap. 890,
Laws of 1915, Chap. 340,
Laws of 1917, Chap. 797,
Laws of 1917, Chap. 799,
Laws of 1918, Chap. 34,
Laws of 1918, Chap. 250,
Laws of 1922, Chap. 636.

On April 10, 1931, the Assembly and the Senate of New York State, by concurrent resolution, sought to accomplish the districting of the State into 45 districts for the election of Representatives to the Congress of the United States (Record 12, 37–58). The Attorney-General advised the Secretary of State that this attempted procedure was invalid and that the said districts should not be certified for the purposes indicated therein (Record 67–85).

Petitioners thereupon instituted mandamus proceedings to compel the Secretary of State to carry out the terms and provisions of the concurrent resolution (Record 8–9).

The answer of the Respondent, Secretary of State, set up as a further defense the existence of Chapter 890 of the Laws of 1911, dividing the State into 43 districts for Representatives and the absence of any subsequent statute effecting similar districting or any repeal of the said Chapter 890 of the Laws of 1911 (Record 63).

The answer likewise set up the reasonable provisions which should govern districting for Representatives and which are not contained in the districts set forth in the concurrent resolution; to wit: contiguity, compactness and reasonable equality in enumeration.

The Supreme Court at Special Term, the Appellate Division and the Court of Appeals, have acted with unanimity in denying the petition.

OPINION OF THE COURT OF APPEALS

(Record 128–134)

The opinion of the Court of Appeals may be said to have laid down four clear grounds for declaring the concurrent resolution ineffective:

(1) That the prescription of the boundaries of the districts for the election of Representatives is a function which, when exercised by a legislature, should be exercised by law (Record, 132); that such has been the uniform practice of New York and other States in the constitutional and legislative history of this country; that the distinction is clear cut between the exercise of the legislative function, such as the prescribing of rules of conduct for elections, and the mere expression of consent or dissent as in the ratification of appointments or amendments (Record, 133);

(2) That Chapter 890 of the Laws of 1911 of the State of New York is still effective to accomplish the districting of the State for purposes of the election of Representatives and has not been repealed (Record, 134);

(3) That the Congressional Act of August 8th, 1911, is still applicable insofar as it lays down just and reasonable rules for the districting of states for the election of Representatives, and is still in force as supplementing the provisions of the Act of Congress of June 18th, 1929 (Record, 133);

(4) That the provisions of Sections 3 and 4 of the Act of Congress of August 8, 1911, set up a just and reasonable rule to be followed, which has been recognized by similar enactments over a long period of years, and would be applicable to any districting by a State legislature "even if the statute does not govern *ex proprio vigore*" (Record, 135).

JURISDICTION

The petition for the writ herein is based upon Section 344 of the United States Code Annotated (Section 237 of the Judicial Code as amended). Subdivision b, relating to writs of certiorari, grants jurisdiction to this Court when the validity of a statute of the United States is questioned; or where the validity of a state statute is questioned on the relation of its alleged repugnance to the Federal Constitution or laws.

The only basis, therefore, on which a writ in the instant case may be granted is if a justiciable question is presented which cannot be determined without resort to the Federal Statutes said to be involved and in which the validity of the latter is questioned. No such circumstance is herein presented.

ISSUE PRESENTED BY THE PETITION FOR THE WRIT

The question here presented is: Should the Supreme Court of the United States review a final determination of the Court of Appeals, the court of last resort in New York State, to the effect (1) that the function of prescribing Congressional districts as granted to the state legislatures by Section 4, Article 1 of the Federal Constitution should be exercised by the said state legislatures in the form of a statutory enactment; and (2) that Chapter 890 of the Laws of New York for 1911 has not been repealed by the concurrent resolution.

SUMMARY OF ARGUMENT

The Respondents herein submit to the Court:

That the determination as to the manner of the exercise of the function of Congressional districting provided for by Section 4 of Article 1 of the Constitution of the United States as one to be performed by legislative enactment, has heretofore been conclusively determined by this Court;

That the determination as to what constitutes a legislative function to be performed by statutory enactment is in the highest appellate court of the state or in the state constitution, if there found, and not subject to review by the Supreme Court of the United States;

That Chapter 890 of the Laws of 1911 of the State of New York being still effective, the resolution cannot prevail and the question as to whether or not the said Chapter 890 of the Laws of 1911 of the State of New York is effective is a matter for the highest court of the state to determine; insofar as it does not conflict with the Federal statute, the said determination by the state

court is not subject to review by the Supreme Court of the United States.

By reason of the foregoing, Respondents submit that the petition should be denied.

POINT I

The determination as to the manner of the exercise of the function of Congressional districting provided for by Section 4 of Article I of the Constitution of the United States as one to be performed by legislative enactment has heretofore been conclusively determined by this Court.

The Supreme Court of the United States has conclusively determined that the division of the states into districts for the election of Representatives is a legislative function properly exercised by the enactment of a statute and clearly distinguishable from the function of assent to a resolution or amendment (*Davis* v. *Hildebrandt*, 241 U. S. 565; *Hawke* v. *Smith*, 253 U. S. 221). The distinction herein contended is clearly pointed out by this Court in the *Hawke* case at page 230:

> "The *power to legislate* * * * is derived from the people of the State.
>
> "The *power to ratify* * * * has its source in the Federal Constitution. The *act of ratification* by the State derives its authority from the Federal Constitution to which the State and its people have alike assented."
>
> (Emphasis ours)

The function dealt with in Article 1, Section 4, of the Constitution is further distinguished in lucid language by the Court at page 231:

> "Article 1, Sec. 4, *plainly* gives authority to the State *to legislate* within the limitations

therein named. Such *legislative action* is *entirely different* from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In *such expression, no legislative action* is authorized or required."

(Emphasis ours.)

The uniform practice of the states and the uniform provisions of Congressional acts comprising a course of conduct are of substantial weight in the determination of the proper exercise of similar functions, (*Briscoe* v. *Bank,* 36 U. S. 256, 318; *McPherson* v. *Blacker,* 146 U. S. 1, 36–7; *Stuart* v. *Laird,* 5 U. S. 298, 308).

Whether Congressional districting is such a function as should be subject to the veto power of the governor, when determined by the state court of final resort, is not one which is subject to review by the United States Supreme Court:

Davis v. *Hildebrandt,* 241 U. S. 565; paragraph 1 at p. 567;
Detroit v. *Osburne,* 135 U. S. 492;
Clarborne Co. v. *Brooks,* 111 U. S. 410.

POINT II

The determination as to what constitutes a legislative function to be performed by statutory enactment is in the highest Appellate Court of the State or in the State Constitution, if there found, and not subject to review by the Supreme Court of the United States.

The constitutions of various states contain provisions specifying that the function of districting for Congressional representation shall be performed by law, (Virginia, Section 55; Utah, Ar-

ticle 9, Section 1). Such provisions make legislative enactment mandatory. The word of the state constitution is final. It will not be set aside by the Supreme Court of the United States ~~unless in direct conflict therewith.~~ It is the final word on what constitutes a legislative function for that state.

Minnesota merely vests in the legislature the power to district without further indication of the manner in which it shall be exercised. If Congress, under Article 1, Section 4, has acted by law, obviously the legislature of the state is bound by the regulations laid down by Congress. Hence if the Congressional Act of August, 1911, prevails, the action of the Minnesota legislature as indicated in *Smiley* v. *Holm*, now before this Court, is invalid. The determination of that case, however, does not necessarily involve a like determination of the instant proceeding. The New York Constitution is silent and the highest court of New York has held that irrespective of the applicability of the Congressional Act of 1911, the course of conduct laid down by Sections 3 and 4 of that act prevail and furthermore, there are other governing factors in New York on which the highest court has spoken, irrespective of Congressional limitation, (*Doyle* v. *Hofstader*, 257 N. Y. 244; *Rumsey* v. *People*, 19 N. Y. 41 at 50).

POINT III

Chapter 890 of the Laws of 1911 of the State of New York, being effective and not conflicting with any Act of Congress of the United States, cannot be repealed by concurrent resolution. No reviewable question is therefore presented to this Court.

The law-making power, by the Constitution of the State of New York, is vested in the Senate,

the Assembly and the Governor (*Doyle* v. *Hofstader, Supra,* page 261; Constitution of New York, Article III, Sections 14 and 15). Concurrent resolutions do not have the effect of law in New York, (*People* v. *Palmer,* 12 Misc., 392, affirmed 146 N. Y. 460; *Doyle* v. *Hofstader, supra*). Districting by legislative enactment is a continuous process and one legislative enactment accomplishing districting continues to be operative until a subsequent legislative enactment has superseded it. A law accomplishing districting does not expire or operate to repeal itself by virtue of the tardiness of the legislature in effectually accomplishing a similar purpose by subsequent enactment, (*Rumsey* v. *People,* 19 N. Y. 41 at 50). Chapter 890 of the Laws of 1911 of the State of New York has continued by amendment to be effective to date, (Laws of 1915, Chapter 340; Laws of 1917, Chapters 797–799; Laws of 1918, Chapters 34, 250; Laws of 1922, Chapter 636; *People ex rel. Fitzgerald* v. *Voorhies,* 222 N. Y. 494).

The determination by the Court of Appeals that said Chapter 890 of the Laws of 1911 is still operative for the purpose of accomplishing the election of Representatives by the districts therein set forth is the final determination upon a statutory enactment of the state which in no way conflicts with any Congressional legislative intent and therefore is not reviewable under the provisions of Section 327 of the Judicial Code as amended. There is no repugnance to the Federal Constitution in continuing the effectiveness of Chapter 890 of the Laws of 1911 in the State of New York. The Congressional Act of 1929 relates solely to provision for a ratio of State Member-

ship in the House and contains no provision whatever with regard to prescribing districts within the several States and therefore in no way renders ineffective Chapter 890 of the Laws of 1911 of the State of New York, which the Court of Appeals has held to be in full force and effect.

No discussion is ventured as to the effectiveness of the Act of Congress of August 8th, 1911, inasmuch as the determination of the Court of Appeals has indicated that the provisions thereof, even if ineffective to supplement the Act of 1929, still prevail as a reasonable course of conduct indicated by previous legislative enactment. Irrespective, therefore, of the Congressional Act of 1911, there is no conflict and no validity called in question of a Federal statute by the determination of the New York court which is here sought to be reviewed.

With relation to the latter argument, however, it is well known that repeals by implication will not be favored by this Court. There being no irreconcilable features pointed out between the provisions of Chapter 890 of the Laws of 1911 of the State of New York and the Congressional Acts, whether in force or not, the effectiveness of the State statute will not be upset; (*United States* v. *Greathouse,* 166 U. S. 601 at 605; *Washington* v. *Miller,* 235 U. S. 422 at 428; *Frost* v. *Wenie,* 157 U. S. 46; Cooley, Constitutional Limitations, 5th Edition, 183; *Holden* v. *Minnesota,* 137 U. S. 483 at 491; *Kennedy* v. *United States,* 265 U. S. 344).

There is no limitation of time nor limitation of effectiveness contained in Chapter 890 of the Laws of 1911 of the State of New York. (*Rumsey* v. *People, supra,* p. 13.)

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari be denied. The highest court of the State of New York has determined that the function of districting is one subject to legislative action in the form of law-making; that the provisions of the Act of Congress of 1911 render such action mandatory; that irrespective of the said Act of Congress of 1911, the course of conduct is reasonable and proper and established by precedent; that Chapter 890 of the Laws of 1911 of the State of New York is effective and has not been repealed.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1931.

Docket No. 731.

SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD,

Petitioners-Appellants,

against

EDWARD J. FLYNN, Secretary of State of the State of New York,

Respondent,

and

JAMES A. FARLEY, Chairman of the Democratic State Committee,

Intervenor-Respondent.

RESPONDENT'S BRIEF

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Note: For Congressional debates, reports, tabulation of statutes, etc., reference is made herein to the appendix of the brief for appellants in Smiley v. Holm (Minnesota), now before the court.

IN THE

Supreme Court of the United States

October Term, 1931

Docket No. 731

SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD,
Petitioners-Appellants,

against

EDWARD J. FLYNN, Secretary of State of the State of New York,
Respondent,

and

JAMES A. FARLEY, Chairman of the Democratic State Committee,
Intervenor-Respondent.

(A) JURISDICTION

The basis for calling upon the jurisdiction of this court in the instant appeal is said to be found in section 344 of the United States Code Annotated (§ 237 of the Judicial Code as amended). This court in the instant case has allowed a writ of certiorari. The claim made by the petitioners

appellants is that the instant case (1) questions the validity of a statute of the United States (Act of Congress, Aug. 8, 1911) and/or the validity of a State statute (ch. 890, Laws of N. Y., 1911); and (2) calls for an interpretation of Article I, section 4 of the Federal Constitution in relation to said statutes.

In order to sustain that position appellants must establish that there is presented (1) an issue for this court which cannot be determined without resort to a Federal statute and in which the latter is called in question, or (2) an issue in which a State statute runs counter to either a Federal statute or the Federal Constitution. It will be evident from a review of the facts and the law in the instant case that neither such circumstance nor issue is here presented.

(B) ORIGIN OF THE CASE

The Constitution of the State of New York is silent on the manner in which the function of fixing the boundaries of Representative districts for Congressional elections shall be exercised. In this respect, it differs from the constitutions of Minnesota, Utah, Virginia and others containing such provisions. (Virginia Constitution, Section 55; Utah Constitution, Section 1, Article 9; Minnesota Constitution, Article 4, Section 23). The New York Constitution does deal with the manner of the subdivision of the State into districts for its own State legislative bodies. In doing so, the New York State Constitution lays down certain reasonable rules of conduct which govern the said districting (Article III, Sections 4 and 5; see also §§ 3 and 4 of Act of Congress of Aug. 8, 1911).

From the beginning of its history up to April 10, 1931, the districting of New York State for Congressional representation has invariably been accomplished by statutory enactment:

Laws of 1789, Chap. 11,
Laws of 1792, Chap. 5,
Laws of 1797, Chap. 62,
Laws of 1801, Chap. 64,
Laws of 1802, Chap. 72,
Laws of 1804, Chap. 19,
Laws of 1808, Chap. 170,
Laws of 1812, Chap. 120;
Laws of 1818, Chap. 126,
Laws of 1821, Chap. 84,
Laws of 1822, Chap. 250,
Revised Statutes, Part I, Chap. II,
Title III, Laws of 1832, Chap. 334,
Laws of 1842, Chap. 325,
Laws of 1851, Chap. 490,
Laws of 1862, Chap. 454,
Laws of 1872, Chap. 619 (Passed over Governor's veto),
Laws of 1873, Chap. 798,
Laws of 1883, Chap. 424,
Laws of 1892, Chap. 295.
Laws of 1901, Chap. 591,
Laws of 1902, Chap. 298,
Consolidated Laws, Chap. 57,
(Chap. 298, Laws of 1909),
Laws of 1911, Chap. 890,
Laws of 1915, Chap. 340,
Laws of 1917, Chap. 797,
Laws of 1917, Chap. 799,
Laws of 1918, Chap. 34,
Laws of 1918, Chap. 250,
Laws of 1922, Chap. 636.

On April 10, 1931, the Assembly and the Senate of New York State, by concurrent resolution, sought to accomplish the districting of the State into 45 districts for the election of Representatives to the Congress of the United States (Record 12, 37–58). The Attorney General advised the Secretary of State that this attempted procedure was invalid and that the said districts should not be certified for the purposes indicated therein (Record 67–85).

Petitioners thereupon instituted mandamus proceedings to compel the Secretary of State to

carry out the terms and provisions of the concurrent resolution (Record 8–9).

The petition itself did not reveal whether an alternative or a peremptory writ of mandamus was sought. The answer of the Secretary of State of the State of New York therefore denied the effectiveness of the concurrent resolution and set up affirmatively the existence and effectiveness of Chapter 890 of the Laws of 1911 of the State of New York; the uniform and reasonable course of conduct laid down by Sections 3 and 4 of the Congressional Act of August 8, 1911; and as a further defense, the lack of compactness, gross inequalities in numbers of inhabitants and lack of contiguity in the districts created by the said concurrent resolution. Upon the initial argument petitioners stated that they sought a peremptory order of mandamus and the order of the court in the first instance and upon appeal denied the said petition for a peremptory mandamus as a matter of law.

The Supreme Court of New York at Special Term, the Appellate Division and the Court of Appeals have all acted with unanimity in holding the said concurrent resolution invalid.

(C) OPINION OF THE COURT OF APPEALS

The Court of Appeals has laid down four grounds for declaring the concurrent resolution ineffective:

> (1) That the prescribing of boundaries of the districts for the election of Representatives is a function which, when exercised by a legislature, should be exercised by law (Record, 132); that such has been the uni-

form practice of New York and other States in the constitutional and legislative history of this country; that the distinction is clear between the exercise of a legislative function, such as the prescribing of rules of conduct for elections, and the mere expression of consent or dissent as in the ratification of appointments or amendments (Record, 133);

(2) That Chapter 890 of the Laws of 1911 of the State of New York is still effective to accomplish the districting of the State for purposes of the election of Representatives and has not been repealed (Record, 134);

(3) That the Congressional Act of August 8th, 1911, is still applicable insofar as it lays down just and reasonable rules for the districting of states for the election of Representatives, and is still in force as supplementing the provisions of the Act of Congress of June 18th, 1929 (Record, 133);

(4) That the provisions of Sections 3 and 4 of the Act of Congress of August 8, 1911, set up a just and reasonable rule to be followed, which has been recognized by similar enactments over a long period of years, and would be applicable to any districting by a State legislature "even if the statute does not govern *ex proprio vigore*" (Record, 135).

(D) ISSUES PRESENTED BY THIS APPEAL

The following questions are presented by the instant apeal:

(1) Is the determination of the State court conclusive upon the issues there decided?

(2) Is the function of districting a State for representation in the Congress of the United States one properly exercisable by the enactment of laws and not as here attempted by the mere resolution of the representative bodies of the State legislature?

(3) Do the provisions of Sections 3 and 4 of the Act of Congress of August 8, 1911, prevail under the Reapportionment Act of 1929 either (a) by the effectiveness of said sections through non-appeal, or (b) by the effectiveness of such provisions as a reasonable and just course of conduct to be pursued as a matter of sound public policy in the subdivision of States into districts for representation in Congress?

(E) SUMMARY OF ARGUMENT

Respondent Secretary of State of New York submits to this court:

The determination of the Court of Appeals of the State of New York, the court of last resort of that State, is conclusive to the effect that the said concurrent resolution of April 10, 1931, of the Senate and Assembly of the State of New York is ineffective to accomplish the districting of the said State for representation in the Congress of the United States;

That the function of subdividing the State into districts for the choice of Representatives in the Congress of the United States is one properly exercisable by the enactment of statute and not through resolution of only part of the law-making machinery of the State;

That the provisions of Sections 3 and 4 of the Congressional Act of August 8, 1911,

set up a just and reasonable course of conduct recognized by Congress and the States over a period of years and applicable to the districting by a State for representation in Congress;

That Chapter 890 of the Laws of 1911 of the State of New York is consistent with and not repugnant to any presently effective act of Congress and/or any provisions of the Constitution of the United States relating to the representation of the inhabitants of the State of New York in the Congress of the United States;

That the districts sought to be set up by the so-called concurrent resolution are violative of the principles of equality of representation, work a disfranchisement of a large proportion of the population of New York State, and deny to said population a just representation in the House of Representatives of the Congress of the United States.

POINT I

The determination of the Court of Appeals of New York is conclusive upon the issues determined.

The law-making power of the State of New York is vested by its Constitution in the Senate and Assembly and the Governor (New York Constitution, Art. III, §§ 14 and 15; *Doyle* v. *Hofstader,* 257 N. Y. 244 at 261).

Concurrent resolutions in the State of New York do not have the effect of law.

People v. *Palmer,* 12 Misc. 392; aff. 146 N. Y. 406
Doyle v. *Hofstader,* supra

Chapter 890 of the Laws of 1911 of the State of New York subdivided the said State into 43 districts for the election of Representatives in the Congress of the United States. It has been subsequently amended by the Laws of 1915, Chapter 340; Laws of 1917, Chapters 797–799; Laws of 1918, Chapters 34, 250; Laws of 1922, Chapter 636. Its constitutionality has been passed upon (*People ex rel. Fitzgerald* v. *Vborhies*, 222 N. Y. 494).

A law accomplishing districting does not expire or operate to repeal itself by virtue of the tardiness of the legislature in failing to enact a subsequent statute in due time, (*Rumsey* v. *People*, 19 N. Y. 41 at 50). Districting by legislative enactment is a continuous process and the preceding statute therefore remains operative until subsequent enactment has superseded it.

The Court of Appeals as the highest court of the State of New York has determined that Chapter 890 of the Laws of 1911 (N. Y.) is still effective for the purpose of accomplishing election of Representatives from 43 districts and that the two additional representatives from New York under the census of 1930 shall be elected at large (Record p. 134).

There is no conflict with any Federal Statute in this determination. It violates none of the provisions of the Act of Congress of June 18, 1929 which merely results in the allocation to New York of 45 Representatives. It is consistent with the Act of Congress of August 8, 1911, which latter the appellants herein claim to be entirely inoperative. We find no repugnance in this deter-

mination by the Court of Appeals nor in this State statute to Section 4, Article I of the Federal Constitution, which provides *inter alia* that the Legislature of the State shall "prescribe" the manner, etc. of the election of Representatives to Congress.

The Court of Appeals has further determined that the function of districting is one exercisable only under the law-making power of the State, subject to the veto power of the Governor. There is nothing in the language of Section 4, Article I of the Federal Constitution which indicates how the function shall be exercised in each State. What constitutes the "legislature" for the purpose of districting is likewise a matter which is not defined in the Federal Constitution and which has been determined in this instance by the court of last resort in the State of New York. Thus no reviewable issue is presented to this Court.

Davis v. *Hildebrandt,* 241 U. S. 565, 567–8
Detroit v. *Osborne,* 135 U. S. 492
Clairborne Co. v. *Brooks,* 111 U. S. 410
Koenig v. *Flynn,* 258 N. Y. 292 (the instant case).

Article I, Section 4 of the Federal Constitution provides:

> "Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or

alter such Regulations, except as to the Places of choosing Senators. * * *."

The Constitution of the United States represents a grant of powers to the central government from the sovereign States. Section 4, of Article I is a reservation by the States of the power to exercise the control of the times, the places and the manner of holding elections for Representatives with the power in Congress itself to lay down regulations or alter such regulations as the States may have imposed. It therefore remains for the States themselves to determine how the function therein reserved to the sovereign States shall be exercisable. It does not present a question of interpretation of the Federal Constitution for review by the Supreme Court of the United States. There is no indication in the language of Article I, Section 4, that the function therein referred to must be exercised by any particular part of the law-making body of the State, nor how the State "Legislature" shall be constituted. The determination of that question must be found in the State Constitution or in the determination of its highest court.

The concurrent resolution which is before this court in the instant appeal after setting forth the districts which it proposes to erect for the election of Representatives to the Congress of the United States, provides for the definition of Assembly districts, towns, wards, election districts, etc. (Exhibit D, fol. 163). It further proposes to set up a course of conduct for the canvassers of elections, which provisions are covered by the Election Law of the State of New York (Chap. 17,

Consolidated Laws, State of New York). The said resolution further provides "that the provisions of the election law, in so far as they are not inconsistent herewith, relating to the election of representatives from this state in congress, to fill vacancies by expiration of term or otherwise occurring or existing after the general election in the year 1932, shall continue in force until repealed, superseded or amended." (Record fol. 167.)

Obviously such a provision attempts to repeal whatever provisions of the Election Law might be inconsistent therewith. We therefore have presented here a doctrine for the repeal of a statute by resolution. It is clear under the Constitution of the State of New York that a statute cannot be repealed except by a law. It has been conclusively determined by that court, as hereinbefore set forth, that a concurrent resolution is not a statute.

People ex rel. Argus Co. v. *Palmer*, 12 Misc. 392; affd. 146 N. Y. 406.

The resolution therefore is ineffective not only to repeal the provisions of the Election Law, but ineffective to repeal Chapter 890 of the Laws of 1911 of the State of New York which prescribes 43 districts and from which representatives may be chosen without disturbing any Act of Congress now in force and without running counter to any of the provisions of the Federal Constitution.

POINT II

The process of prescribing the boundaries of districts for the election of Representatives to the Congress of the United States under Article I, Section 4, of the Federal Constitution, calls for the exercise of the law-making function.

(A) ARGUMENT FROM PRECEDENT

1. Historically we are confronted with the unanimous experience of all States from the inception of the National government in 1787 to the year 1931. In no State for the past one hundred and forty-five (145) years has there been any attempt to exercise the function of prescribing the boundaries of districts for the election of Representatives to the Congress of the United States in any manner other than by law.

The only instances which have been seized upon for example by the appellants herein are those of Massachusetts in the years 1788 and 1792. It appears that in those two years Massachusetts sought to district the State by resolution of the representative bodies of the Legislature. But these resolutions in both instances, the archives show to bear the signature of approval of John Hancock, then the Governor of Massachusetts. Under the Massachusetts Constitution as it existed up to 1794, a resolution of the legislature with the approval of the Governor had the effect of law (Ch. 1, Art. I, § 1–1780).

By the Constitution of the State of Maine today a resolution approved by the Governor has the effect of law, the only difference being in the number of readings before the Legislature (Maine Const. Art. IV, § 2). We find, however, that Maine has uniformly acted by statute.

It is therefore unquestioned, and the appellants herein have admitted, that the uniform experience of the States has been to prescribe districts by law, whether said law was effected by bill or by resolution with the approval of the Governor.

Reference has been made by the appellants herein to the State Constitutional Convention of Massachusetts of 1820 as authority for their contention. The said proceedings indicate that said Convention rejected a resolution proposing an amendment to the Massachusetts Constitution which would lay down rules limiting the discretion of the Legislature in the prescribing of the times, places, etc., for the election of Representatives in Congress by districts. Up to 1842 no Federal enactment referred to districts. Therefore the proposition was viewed as an attempt to limit the State Legislature by the State Constitution so as to necessitate districting. The opposition to such an amendment in no way indicates that the function of districting was not properly exercisable by law. Any attempt to draw such conclusion is indicative of a failure intelligently to read the debates before the Massachusetts Convention of 1820. (Hind's Precedents, Vol. 1, pages 653 ff.)

In addition to the uniform practice of the States in districting by law we find in certain States constitutional provisions making districting by law mandatory. For example, the Constitution of Virginia, Section 55, reads as follows:

> "*The General assembly shall by law apportion the State* to districts corresponding with the number of representatives to which it may be entitled in the House of Representa-

tives of the Congress of the United States; which districts shall be composed of contiguous and compact territory containing, as nearly as practicable, an equal number of inhabitants."

The Constitution of Utah, Section 1, Article 9, reads as follows:

"One representative in the Congress of the United States shall be elected from the state at large on the Tuesday next after the first Monday in November, A. D. 1895, and *thereafter at such times and places and in such manner as may be prescribed by law.* When a new apportionment shall be made by Congress the legislature shall divide the state into congressional districts accordingly."

The Constitution of Minnesota contains almost the same language as the Federal Constitution but does not indicate how the function shall be exercised. Article 4, Section 23, provides:

"The legislature shall provide by law for an enumeration of the inhabitants of this State in the year 1865 and every tenth year thereafter. At their first session after each enumeration so made and also at their first session after each enumeration made by the authorities of the United States the legislature shall have power to prescribe the bounds of congressional * * * districts * * *."

The New York State Constitution has no provision whatsoever concerning congressional districts. Despite the absence of constitutional mandate as found in the Constitutions of Virginia and

Utah, however, every State has without exception acted uniformly up to the year 1931 by statutory enactment.

New York State has so acted. (See page 3.)

The Constitution of the State of New York, however, in numerous instances provides that the "Legislature" may district or otherwise function in regard to various State governmental activities.

Article VI, Sections 1, 2, 9, 14, 16, 18 and 20 read as follows:

Section 1:

"The *legislature* may from time to time increase the number of justices in any judicial district. * * * The *legislature* may erect out of the Second Judicial District as now constituted another judicial district and apportion the justices * * *."

Section 2:

"The *legislature* shall divide the state into four judicial districts."

Section 9:

"The *legislature* may further restrict the jurisdiction of the Court of Appeals * * *."

Section 14:

"The *legislature* may hereafter enlarge or restrict the jurisdiction of the county courts."

Section 16:

"The *legislature* may * * * provide for the election of local officers * * * to discharge the duties of the County Judge and of the Surrogate in case of their inability * * *."

Section 18:

"Inferior courts of civil and criminal jurisdiction may be established by the *legislature* * * * The *legislature* shall not hereafter confer upon any inferior local court of its creation and equity or jurisdiction or any greater jurisdiction in other respects than is conferred upon county courts by or under the article."

Section 20:

"No judicial officer except Justices of the Peace shall receive to his own use any fees * * *. The *legislature* may impose a similar prohibition upon county judges and surrogates * * *."

In rendering effective these constitutional provisions the Senate and the Assembly of the State of New York have always acted by statute in conjunction with the Governor, and never otherwise. It cannot now seriously be contended that these functions, the power to exercise which is vested in the "legislature" of the State by its Constitution, could be performed by concurrent resolution. Yet the "legislature" consists of the Senate and Assembly.

So too in Missouri in regard to congressional as well as other districts, it has been held to be a matter of the exercise of "legislative authority" and not otherwise.

The Supreme Court of Missouri in *State ex rel. Barrett* v. *Hitchcock*, 241 Mo. 433, said:

"That the districting of the State into legislative, senatorial, congressional and

judicial districts is the exercise of legislative authority, cannot be successfully questioned. Authorities so hold, and it has been the uniform practice in this and all other states, in so far as I have been able to ascertain; that, too, has been the procedure with the United States Government. That authority is akin to, and flows from the same power and authority that fixes the boundary line of the State, and subdivides the State into counties, etc."

"We do not readily overturn the settled practice of the years." *Story* v. *Craig,* 231 N. Y. 33 at 40; *Matter of La Rocca* v. *Flynn,* 257 N. Y. 5 at 13; *Muller* v. *Oregon,* 208 U. S. 412, 420; *People* v. *Murray,* 149 N. Y. 367, 376.

The uniform practice of the states and the uniform provisions of Congressional acts comprising a uniform course of conduct are of substantial weight in the determination of the proper exercise of similar functions (*Briscoe* v. *Bank,* 36 U. S. 256, 318; *McPherson* v. *Blacker,* 146 U. S., 1, 36-7; *Stuart* v. *Laird,* 5 U. S. 298, 308).

(B) ARGUMENT FROM REASON

Legislatures function and have always functioned subject to certain checks which have also embraced resolutions before the latter might become effective.

Missouri Constitution, Art. V, Sec. 14.
Minnesota Constitution, Art. IV, Sec. 12.
Constitution of the United States, Art. I, Sec. 7.

Some of the duties entrusted to Legislatures may well have been of their very nature necessarily the subject of law-making; others merely the expression of choice or desire by the members of the said representative bodies.

Under the authority vested by Article I, section 4 of the Federal Constitution the State is called upon to determine the manner in which representatives shall be chosen. That authority is vested in the Legislature of the State by the said provision in the Federal Constitution. The function is of such importance that its exercise would naturally be considered subject to all the limitations placed upon the formal enactments of the representative bodies of the legislature. This would seem to be dictated by circumstances of policy irrespective of the historical background presented. Particularly should this be so where the veto of the Governor may be accepted as some assurance that representative bodies of one political faith will not be permitted to arrogate to themselves an undue preponderance of authority to further political aims and continue in power. It has always been the result of a desire to retain political ascendancy that gerrymandering has been the practice of the party in power under the necessity of guarding against eviction from control. Thus the Constitutions of Minnesota, Virginia and Missouri even provide that resolutions are not effective unless approved by the Governor. Resolutions with such approval are effective as law in Maine and were effective as law in Massachusetts prior to 1794.

Even in New York State the presentation of a concurrent resolution for the approval of the

Governor is not without legislative precedent (Assembly Journal 1923, p. 317; Senate Rule 18, Assembly Rule 6). Reapportionment has repeatedly been referred to as part of the "law-making power" of the State (Governor Flower, 1892—Messages, Vol. 9, p. 155; Public Papers Governor Charles E. Hughes 1907, p. 52: "It is not my purpose to propose a particular plan of apportionment. It is the function of the Legislature to formulate such plan and submit it by suitable bill for Executive action").

This message of the present Chief Justice of this court (then Governor of New York) was in reference to an apportionment of the State Legislature. The New York State Constitution (Art. III, sections 4 and 5) uses terminology quite similar to that in section 4, Article I of the Federal Constitution in that the power to prescribe the boundaries of districts and the power to "prescribe" the regulations are vested in the legislature. In both cases the Constitutions refer to the State "legislature." In both cases the word refers to the same body or bodies and reposes the identical authority, to wit: the power to district and redistrict. In the one case it is for congressional representation under the Federal Constitution; in the other case it is for State representation under the State Constitution. In both cases it is the same "legislature" which is to act. No sound reason exists to place upon the word a different significance and upon the function to be exercised a different significance when applied to one from that when applied to the other.

In the case of the constitutional provisions of Utah and Virginia will it be ventured by the ap-

pellants that these constitutional limitations are violative of the spirit or the letter of section 4, Article I of the Federal Constitution? The legislature is the creature of the State Constitution and is bound by the limitations therein. It is straining all powers of interpretation to hold that the provisions of section 4, Article I, which merely vest in the State legislatures a certain function, also defines the manner in which the function itself shall be exercised.

The argument is advanced by appellants that the use of the term "legislature" in section 4 of Article I of the Constitution refers solely to the representative bodies. They argue that the States at the time of the adoption of the Federal Constitution, with the sole exception of Massachusetts, did not permit of a veto by the Governor; they conclude therefrom that the use of the term in the Federal Constitution refers to the representative body and not to the law-making power.

The argument contains its own answer. Since the representative bodies of the State legislature were then the sole residuum of the law-making power, it is more reasonable to conclude that term was intended to indicate the law-making power. The two were synonymous. The legislative power under Article III of the Constitution of New York of 1777 was vested in the Senate and the Assembly with a revisory council consisting of the Governor, the judges of the Supreme Court and the chancellor. The veto power did not enter into the State Constitution until 1821. The framers of the Federal Constitution cannot be said to have foreseen every possible form which

State legislatures might take in the future. It does not follow, therefore, that we can ascribe to them a specific understanding that "legislature" meant the representative bodies as distinct from the law-making machinery. At least it is certain that since the legislature of each State is the creation of its Constitution, what constitutes that legislature and what constitutes the proper exercise of its function resides in the State Constitution or the court of last resort of the State in passing upon the legality of the acts of the legislature thereunder. As to New York, this has been set at rest by *Doyle* v. *Hofstadter*, 257 N. Y. 244, and *Koenig* v. *Flynn*, 258 N. Y. 292. Prior to 1931 we thought it had been set at rest by *Davis* v. *Hildebrandt*, 241 U. S. 565, and *Hawke* v. *Smith*, 253 U. S. 221.

The proper exercise of power to district for representation in legislatures is vital to the free and equal exercise of the franchise. No legislature should be able to pass laws effectually disfranchising large numbers of voters. Elections are equal only when the vote of each elector is as nearly as possible equal in power and influence to the vote of every other elector and where one ballot has no greater preponderance than the ballot of another. Any plan of districting, therefore, which is not based upon an approximate equality of inhabitants will work inequality in the right of suffrage and in the power of the ballot in elections of representatives. If not subjected, therefore, to all the checks of our governmental machinery this power is subject to the uncontrolled abuse of partisan factions momentarily in control of representative bodies of legislatures.

The very fact of an unbroken and continuous exercise of a governmental function under reasonable rules of conduct results in the creation of public confidence in said government. To destroy that confidence is to undermine the very fabric of our political structure. Equality of representation and of the power of the ballot are vital factors to public confidence in a representative form of government. Legalizing an unequal distribution of the power of the ballot not only breaks the continuity of governmental processes but also destroys the confidence of the people in the political institution itself.

Moran v. *Bowley,* 179 N. E. 526, at 531, 532.

By precedent and by reason a sound construction of the function of districting has been established. Why speculate on what the framers of the Constitution may have intended? One of the virtues of the noble document is the very quality which permits of a reasonable interpretation consonant with the changing features of our political life and with sound governmental processes.

> "Constitutional questions, it is true are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special

constitutional limitation goes is affected by the truth in respect to that fact; a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

Muller v. *Oregon*, 208 U. S. 412, 420.
45 *Harvard Law Review*, 355, 360–364 and cases cited.

(C) ARGUMENT FROM THE CASES

Davis v. *Hildebrandt*, 241 U. S. 565 held the referendum as a part of the law-making power in Ohio effective to defeat an enactment providing for the districting of the State for Representatives in Congress. The court did also indicate in the case that the question of legislative power itself might well have rested upon the decision of the highest court of the State (p. 567–8).

"So far as the subject may be influenced by the power of Congress, that is, to the extent that the will of Congress has been expressed on the subject, we think the case is equally without merit. We say this because we think it is clear that Congress in 1911 in enacting the controlling law concerning the duties of the States through their legislative authority, to deal with the subject of the creation of congressional districts expressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that where by the state constitution and laws the referendum was treated as part of the

legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law."

Hawke v. *Smith*, 253 U. S. 221, holds that ratification of amendments is not subject to review by the referendum power, and points out the clear distinction between the legislative function of districting and the exercise of the ratifying power by the representative bodies of the State legislature:

> "It is true that the power to legislate in the enactment of the laws of a State is derived from the people of the State. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented." (p. 230.)
>
> "*Article I, § 4, plainly gives authority to the State to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required.*" (p. 231.)
>
> (Emphasis ours)

Hawke v. *Smith*, 253 U. S. 221 at 230, 231.

Moran v. *Bowley*, 179 N. E. 527

Schrader v. *Polley*, 26 So. Dakota 5; 127 N. W. 848
Rumsey v. *The People*, 19 N. Y. 41, 50
Carroll v. *Becker*, 45 S. W. (2nd) 533 (Advance Sheets March 1, 1932)
King v. *Augusta*, 277 U. S. 100.

The distinction between the exercise of the ratifying function by the legislature and other functions is further referred to in the following cases:

National Prohibition Cases, 253 U. S. 350
United States v. *Sprague*, 282 U. S. 716
McPherson v. *Blacker*, 146 U. S. 1.

See also for discussion in re districting processes:

Stiglitz v. *Shardien*, 40 S. W. (2nd) 315
Richardson v. *McChesney*, 218 U. S. 487.

Supported by an uniform and unbroken experience of the States, substantiated by sound reason and public policy, and, with the exception of *Smiley* v. *Holm* (Minn.), uniformly supported by Federal and State courts, districting for representatives is and should remain a function properly exercisable by the due enactment of laws and subject to all of the checks and balances of our governmental machinery. "Legislature" should mean the body acting under the reasonable limitations imposed for the particular function exercised.

POINT III

The course of conduct laid down by sections 3 and 4 of the Act of Congress of August 8, 1911, constitute a reasonable rule applicable to the apportionment of representatives under the Act of Congress of 1929.

Prior to and including the apportionment bill of 1842 representatives to Congress were apportioned on the basis of a numerical unit of inhabitants. In 1842 for the first time by Section 2 it was provided that the representatives be chosen from districts consisting of contiguous territory (5 Statutes at Large 491). Beginning with 1852, however, representatives were apportioned in accordance with a set number of representatives rather than in accordance with a unit of population, and from 1852 to date there were allocated to each State representatives dependent upon the proportion of the population to the number of representatives determined by Congress to constitute the House of Representatives. In 1852, however, the statute said nothing about districts (9 Statutes at Large 428; 10 Statutes at Large 25).

In 1872 the act provided for the election of representatives by districts consisting of contiguous territory and containing "as nearly as practicable an equal number of inhabitants." The said act further provided for the election at large in the event of an increased number of representatives the others "to which the State is entitled *by the districts now prescribed by law in said State.*"

In the Act of 1882 we likewise find the provision that where no change of representatives is indi-

cated they are to be elected in the States *"as now provided by law."* And in the same section it is further provided that additional representatives are to be elected at large and the others *"by the districts as now prescribed by law in said State,"* (22 Statutes at Large 5, Section 3).

Similarly in the Act of 1891 the language *"as now prescribed by law"* is used (26 Statutes at Large 735).

So too in the Act of 1901, where there is no increase, it is provided that the representatives from a State *"shall be elected from the districts now prescribed by law."* If the number is increased the additional representatives are elected at large and the others in the districts *"now prescribed by law until the legislature of such State* in the manner herein prescribed *shall redistrict such State"* (Sec. 4, Act of Congress January 16, 1901). It is further provided in the said section that if the number is less and there is no redistricting all are to be elected at large.

Thus for a half century prior to 1911 in every enactment of Congress apportioning representatives, the language used indicates clearly that it was accepted as established that the districts from which representatives were elected were *"prescribed by law"*; else why was such terminology uniformly adopted by Congress.

In the Act of 1911 this was merely extended by the use of the words "shall be redistricted in the manner provided by the laws thereof." The contention of appellants that the use of these words was intended to prescribe a course of legislative conduct, which, without them would not be imposed upon the State legislatures, is not well taken.

The Act of Congress of June 18, 1929, makes no reference to districts, nor to the manner of the choice of representatives.

Sections 3 and 4 of the Act of 1911 prescribe reasonable regulations for compactness, contiguity and equality of numbers of the districts from which representatives are to be chosen. The course of conduct thus laid down is in no way inconsistent with the provisions of the 1929 act, the repealer provision of which (Sec. 21) merely repeals those parts of other laws "inconsistent" therewith. Sections 1 to 21 of the Act of 1929 provide for a census. Section 22 provides for a formula for a Presidential apportionment. It expressly provides for its non-repeal in the event that Congress should fail to enact an apportionment after a subsequent census. The only addition in the 1929 Act outside of the census machinery is the provision for an automatic realignment of the number of representatives from the various States.

Section 3 of the Act of 1911 looks to the future, "each subsequent Congress" (See also *Rumsey* v. *The People*, supra).

It is respectfully submitted that the use of the words "under this apportionment" in the Act of 1911 as found in Sections 3 and 4, in no way limits the reasonable course of conduct therein prescribed as applicable to subsequent legislation, the provisions of which subsequent legislation merely provide for a repeal of inconsistent prior legislation.

There is no favored doctrine of implied repeal or substitution. The determinations of this court upon that question are quite emphatic. A literal

construction will not be substituted for a reasonable interpretation and where repeals by implication are not favored by the court, a reasonable construction rendering both acts consistent with one another will be adopted if possible.

U. S. v. *Greathouse*, 166 U. S. 601, 605.
U. S. v. *Lee Yan Tai*, 235 U. S. 213, 221.
Washington v. *Miller*, 235 U. S. 422, 428.
Woods v. *Supervisors*, 136 N. Y. 403, 409.
Matter of Tiffany, 179 N. Y. 455, 457.

Reference to the legislative debates as well as to the reports of the committees of Congress on the Act of 1929 lends support to the contention that Sections 3 and 4 of the Act of 1911 are not repealed by the Act of 1929 (Report of the Senate Committee on Commerce on Senate Bill No. 312, April 22, 23, 1929). Committee reports are clearly indicative of legislative intent and are so to be regarded by the courts.

Duplex v. *Deering*, 254 U. S. 443 at 474.
Oceanic Navigation Co. v. *Stranahan*, 214 U. S. 320 at 332.
Congressional Record, Vol. 71, Part 3, pages 2444, 2445, etc.

The situation which prompted the legislation may be ascertained to a certain extent from the debates.

Standard Oil Co. v. *U. S.*, 221 U. S. 1 at 50.

These debates and the committee reports expose the fallacy of the claim of implied repeal of Sections 3 and 4 of the Act of Congress of 1911 (Congressional Record, Vol. 71, Part 3, page 2445).

But even were the provisions of Sections 3 and 4 determined to have been repealed by implication or otherwise, nevertheless the course of conduct there laid down is reasonable and based upon sound public policy. It provides for contiguous, compact districts of as nearly equal as practicable a number of inhabitants. The Minnesota Supreme Court in *Smiley* v. *Holm* has determined that without such a course of conduct laid down by statute legislatures may district without regard to equality of representation. It is respectfully submitted that a gross abuse of such a reasonable course of conduct working the disfranchisement of large numbers of inhabitants would be violative of the provisions of the Fourteenth Amendment and destructive of sound governmental institutions.

The Court of Appeals of the State of New York has well said in the determination now for review before this court that the provisions of the said Act of Congress of August 8, 1911, would still be in force even if the act itself were ineffective. The course of conduct is "simple, direct and universal." The provisions embodied therein have been contained in previous congressional acts and reveal "a practical recognition by Congress of the just and reasonable rule to be followed in the absence of a statute, and that this rule should be followed even if the statute does not govern *ex proprio vigore*."

POINT IV

The districts attempted to be set up by the so-called concurrent resolution present a gross disregard for equality, compactness and contiguity which renders the said resolution in the absence of other considerations invalid.

It is respectfully submitted that the course of conduct for districts, laid down by the Constitution of the State of New York for its own districts (Art. III, Sections 4-5) should be applied by a parity of reasoning to an attempt by the Legislature to provide representation for the inhabitants of the State in the Congress of the United States. A gross disregard of the rights of the citizens to representation will not be permitted to go untouched by the courts and thus have the constitutional safeguards to representation swept away by political considerations of a Legislature which finds its desire to maintain political control thwarted by a diligent executive.

It is sufficient here to refer only to a few of the glaring incidents of inequality. New York State has, by the census of 1930, 12,588,066 inhabitants and New York is assigned forty-five Congressional representatives. New York City, by the census, is given 6,930,447 inhabitants. The rest of New York State represents 5,657,620 inhabitants. Despite a difference of almost 1,300,000 inhabitants between New York City and the rest of New York State, this so-called resolution apportions to the City of New York the same number of representatives (22½) as are apportioned to the balance of the State, *a difference which practically renders over one and a quarter million*

inhabitants powerless to obtain a reasonable and fair representation in the House of Representatives from New York State.

But that difference is not nearly so glaring as is the gross inequality which is created by individual districts. Take, for example, the districts created out of Kings County. Kings County, by the census, is assigned 2,560,401 inhabitants. Kings County could, by a fair subdivision, be entitled to nine full districts of 284,489 inhabitants each, more than the unit provided by the division of the State census into 45 equal parts which would furnish a unit of 279,734 inhabitants. Disregarding entirely this fair subdivision of Kings County, the so-called Concurrent Resolution gives to Kings County eight districts and those eight districts, as pointed out in Exhibit 3 of the answer, furnish glaring *inequalities ranging from the ninth district with* 202,633 *inhabitants, over* 70,000 *below the unitary basis of forty-five districts, to the fourteenth district with an inhabitant population of* 484,893, *over* 200,000 *more than the unitary basis in an equal division of the State into forty-five districts.*

The County of New York, by the fifteenth census, is given 1,867,312 inhabitants which would, under the unitary basis of forty-five equal districts, be entitled to approximately 6½ representatives. New York County should be subdivided into six districts with a surplus available for combination with Bronx County, adjoining, to permit of a fair and equal distribution of the population and districts. However, we find the Legislature by this Concurrent Resolution, divid-

ing New York County into six districts with a *range of population from* 249,292 *in the seventeenth to* 387,067 *in the very next adjoining district, the sixteenth.*

The inequalities between the individual districts in the four districts assigned to the Bronx are not so apparent although it is significant that each district assigned to the Bronx is given more than 30,000 more inhabitants than the unitary basis of forty-five equal districts would apportion.

In any equitable division districts are not supposed to vary unreasonably from the figure given as a unit for population. This is approximately 280,000 for each Representative. From an examination of the resolution passed by the Legislature it is seen that the seven most populous counties of the State have the following representation, population and average population per district:

County	Representation	Population	Average population to district
Kings	8	2,560,401	320,051
New York	6	1,867,312	311,218
Bronx	4	1,265,258	316,314
Queens	4	1,079,129	269,782
Erie	3	762,408	254,136
Westchester	2	520,947	260,473
Monroe	2	423,881	211,940

Dividing the population of each county by the quota 280,000, we find an equitable division of districts would result in the following county representation, population in excess being given also:

County	Representation	Population in excess
Kings (Brooklyn)	9	40,000
New York (Manhattan)	6	197,000
Bronx	4	145,000
Queens	3	239,000
Erie (including Buffalo)	2	202,000
Westchester	1	240,000
Monroe (including Rochester)	1	143,000

The excess of 197,000 in New York could easily be combined with the excess of 145,000 in the Bronx to make compact districts with an excess of 50,000 which could be combined with the next adjoining county of either New York on the one side or Westchester on the other. Similary Monroe County with 423,000 deserves more than one district but certainly not two for which it should have a population of 560,000. It is unfair manifestly to give this county two representatives when it could easily be combined for its excess from one district with the adjoining county to create another. New York City with 6,930,447 receives representation equal to the rest of the State with a population of over one million and a quarter less. The under-representation of Brooklyn is most unfair. Twenty-four representatives instead of twenty-one or twenty-two would be nearer to accuracy and equality.

To continue to detail such inequalities would be superfluous. The foregoing are sufficient to indicate that the so-called Concurrent Resolution creates inequalities in numbers grossly violating the spirit of the Constitution of the State and of the United States as well as the letter of the law.

(F) CONCLUSION

It is time that purity of purpose with which the framers of the Constitution viewed the business of Congressional representation be brought to the fore. That purpose of equality of representation should not be surrendered for all time into the hands of that political group which dominates while an apportionment happens to be made. It is not necessary for the political party system to belittle the legislative function of the States by attempting to accomplish unfair representation through unconstitutional means.

The so-called Concurrent Resolution of the Senate and Assembly of the State of New York of April 10, 1931 is invalid and ineffective. It is contrary to the overwhelming weight of precedent and authority, opposed to the whole legislative history of Congressional redistricting of the forty-eight states from the inception of this government to 1931. It is opposed to the legislative and constitutional history of the State of New York. It is contrary to and in violation of the acts of Congress of August 8, 1911 and June 18, 1929 and of chapter 890 Laws of New York 1911. It so grossly violates the reasonable course of conduct which should govern legislative redistricting in the matter of equality of numbers, compactness of districts and certainty of boundaries, that the said so-called Concurrent Resolution denies a fair and equal representation to the inhabitants of the State of New York.

The determination of the Court of Appeals of the State of New York should not be disturbed and the judgment and order of that Court here appealed from should here be affirmed.

Respectfully submitted,

JOHN J. BENNETT, JR.,
Attorney General, New York State,
Attorney for Respondent,
Secretary of State.

HENRY EPSTEIN,
First Assistant Attorney General,
Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1931. No. 731.

IN THE MATTER
OF THE
APPLICATION FOR A MANDAMUS ORDER BY SAMUEL S. KOENIG, JOHN J. KNEWITZ AND WILLIAM L. WARD,
Petitioners-Appellants,
against
EDWARD J. FLYNN, SECRETARY OF STATE OF THE STATE OF NEW YORK,
Respondent,
AND
JAMES A. FARLEY, CHAIRMAN OF THE STATE COMMITTEE OF THE DEMOCRATIC PARTY,
Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR JAMES A. FARLEY, CHAIRMAN, STATE COMMITTEE OF DEMOCRATIC PARTY.

JOHN GODFREY SAXE,
Attorney for Respondent-Intervenor, JAMES A. FARLEY, Chairman, of the State Committee of the Democratic Party.

ROBERT F. WAGNER,
JOHN GODFREY SAXE,
JOHN J. O'CONNOR,
of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 731.

IN THE MATTER

OF THE

Application for a mandamus order by SAMUEL S. KOENIG, JOHN J. KNEWITZ and WILLIAM L. WARD, Petitioners-Appellants,

AGAINST

EDWARD J. FLYNN, Secretary of State of the State of New York, Respondent,

AND

JAMES A. FARLEY, Chairman of the State Committee of the Democratic Party, Intervenor-Respondent.

Brief for James A. Farley, Chairman, State Committee of Democratic Party.

Statement.

Certiorari by petitioners from an order of the Court of Appeals of the State of New York, unanimously affirming an order of the Appellate Division, Third Department, unanimously affirming an order of Mr. Justice Ellis J.

Staley, denying petitioners' application for a mandamus order, which would direct the respondent Secretary of State to proceed in accordance with a Concurrent Resolution of the New York Senate and Assembly, dated April 10, 1931.

The facts consist of allegations. They are set forth in a petition of the moving parties and in an answer of the Secretary of State. Mr. Farley, Chairman of the State Committee of the Democratic Party, intervenor, has united in the answer (R. 6).

The petition sets forth the following public records:

Act of Congress of June 18, 1929 (Exhibit A);

President's Message, dated December 4, 1930 (Exhibit B);

Certificate of Clerk of House of Representatives to Governor of State of New York, dated March 4, 1931 (Exhibit C);

Concurrent Resolution of the Senate and Assembly, dated April 10, 1931 (Exhibit D).

The answer is as follows:

By way of denial:

(a) The Act of Congress of June 18, 1929, is challenged to the extent of alleging that the Federal provisions as to Congressional Reapportionment are regulated by sections 3 and 4 of the Act of Congress of August 8, 1911, as well as by the 1929 Act, and that both are now in full force and effect.

(b) The admission of the Concurrent Resolution is limited to the fact of its adoption, in form pleaded.

The answer contains two separate defenses which adopt most of the allegations of the petition. In the first defense, the following records are also pleaded:

Constitution of the United States, Article I, section 4;
Act of Congress of August 8, 1911;
The United States Code, Title II, Chap. 1, Secs. 3-4;
New York Laws of 1911, Chap. 890, as amended.

It also sets forth the essential difference, under the New York Constitution, between the enactment of a Law and the passage of a Concurrent Resolution.

In the second defense, it is alleged, in appropriate language, that the Concurrent Resolution did not redistrict the State of New York in compliance with Act of Congress of 1911. Denials in paragraphs 12 and 13, raising the same issue, were withdrawn at Special Term (R. 6).

This application thus presents the meaning and interrelation of a variety of Constitutional provisions, Acts of Congress, New York statutes and a Concurrent Resolution. Our Statement, therefore, will summarily present the questions of constitutional, statutory and decision law involved, rather than follow the usual form of a discussion of facts.

I. The Constitution of the United States was signed on September 17, 1787. It was ratified by the several States between December 7, 1787, and November 21, 1789.

Article I, Section 4, provides as follows:

"The times, places and manner of holding elections for senators and representatives, shall be *prescribed in*

> *each State by the legislature thereof;* but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

At the outset, attention is respectfully called to the fact that any question of construction has to do with the complete phrase, "prescribed in each State by the Legislature thereof", and not merely with the single word "Legislature".

Our First Point will be that this Court in two adjudicated cases has conclusively determined that the phrase "prescribed in each State by the Legislature thereof" means *legislation* in each State by *whomsoever each State* has determined to be *its law-making body.*

> Davis *v.* Ohio, 241 U. S. 565 ("the Hildebrant case");
>
> Hawke *v.* Smith, 253 U. S. 221.

And that it follows, under New York law, as determined by its highest Court, that the Concurrent Resolution is a nullity and ineffective for any purpose.

> Matter of Doyle, 257 N. Y. 244.

Thus, in the instant case, the Court of Appeals held:

> "The wording of section 4, Article I, *very likely suggested* that the action by the State Legislature under it should be *in the form of a law.* It was to be more than an assent by the people of the state to some federal proposition and more than a choice by them of a federal representative. The legislative act was to be a direction to the people of the state demanding certain things to be done, fixing a time, a place and a

manner which had to be followed. From the Legislature was to come a mandate, the disobedience of which would result in penalties or legal consequences. Naturally this would be effected in the same way as all other like mandates. *The action of the Legislature would therefore be in the form of a law.* Section 4 says that the times, places and manner shall be "prescribed" by the Legislature. *"Prescribed" means to lay down authoritatively a rule of action.* From time immemorial this has been done by a law according to the forms existing at the time. *That which must be obeyed and followed by citizens subject to sanctions or legal consequences is a law. Such a direction must take the form of law.* Likewise, in section 4, we find that Congress may exercise the power given to the State Legislature, and when it makes its regulations, it shall do so 'by law.' The matter being dealt with in section 4 is the time, place and manner of holding elections for representatives. *Whether these details be fixed by the Legislature of the state or by Congress, they are to be fixed by law.* If Congress must do it by law, it is reasonable to suppose that the State Legislature was intended to do it in the same way. This, at least, has been the interpretation given to this section for over 140 years, and it is too late now to overturn it.

There is a distinction to be drawn between the functions of a Legislature, such, for instance, as choosing senators, making application to the Federal Government for protection against invasion, ratifying a constitutional amendment, consenting to a purchase of state lands—there is, I say, a difference between these functions of the Legislature and the prescribing or enacting of a rule or direction, which must be followed and obeyed by the people of the state, called the law-making power; such, for instance, as dividing the state

into congressional districts and directing the people where, when and how to vote. We find such a distinction referred to in McPherson *v.* Blacker (146 U. S., 1), State *ex rel.* Davis *v.* Hildebrant (241 U. S., 565), Hawke *v.* Smith (253 U. S., 221), United States *v.* Sprague (282 U. S., 716), although these cases did not pass upon the point here in question (see also Matter of Doyle, 257 N. Y., 244). We conclude, therefore, that the resolution of April 10, 1931, was ineffective, and that its attempted redistricting of the state is null and void."

It is urged that this decision, in so far as it defines the law making power *of New York State,* is a finality.

Davis *v.* Ohio, *supra,* p. 567, subdiv. 1.

Our Second Point will be that since the State Legislature heretofore duly enacted certain statutes to wit, the Election Law and Chapter 890 of the Laws of 1911, the Senate and Assembly were without power to deal *with those statutes* by Concurrent Resolution. A law is enacted only by the votes of a majority of all the members elected to the Senate and to the Assembly, with the approval of the Governor. A Concurrent Resolution may be adopted by a majority of a quorum of each House, and does not call for the approval of the Governor (R. 63). It is our contention that, even if the phrase "prescribed in each State by the Legislature thereof" might be held to be sufficiently broad to authorize either the initiating body, on the one hand, or the whole law-making body as determined by the New York Court of Appeals on the other, to prescribe the boundaries of congressional districts, the fact that the law-making body in 1911 duly enacted a statute, requires, in

and of itself, that if repeal or amendment be sought, it is the law-making body which must act again.

Matter of Doyle, *supra*, pages 259, 261-2.

The Court of Appeals dealt with the first two questions as one. In its recital of facts, it said, in part:

> "Following the census of 1910 Congress enacted the Thirteenth Apportionment Act, in August of 1911 (vol. 37, U. S. Statutes at Large, chap. 5, p. 13)
> * * *
>
> *Thereafter, and in accordance with this act of Congress, New York State passed an act known as chapter 890 of the Laws of 1911, which became a law on October 18, 1911, with the approval of the governor. It read: "For the election of representatives in Congress of the United States, this state shall be and is hereby divided into forty-three districts, namely—" The districts were then described, and it wound up by stating that all acts inconsistent with this law were repealed.*
>
> Thus the matter stood. Representatives were elected in this state from the congressional districts described in this state law of 1911, up to and until the present time. Another census was taken, pursuant to an act of Congress passed June 18, 1929. This act not only provided for the taking of the census, but also provided for the increase or decrease in state representation according to the results of the census. The total number of representatives was not to be increased. * * * It provided for the apportionment of 433 representatives among the various states according to population as indicated by the census, but in no way indicated how the number of representatives allotted to each state should be chosen. The previous Appor-

tionment Act of August 8, 1911, in sections 3 and 4, above quoted, made such a direction, but it is lacking in this later Act of June 18, 1929. Upon the certificate of the President to Congress, followed by the certificate of the clerk of the House, all in accordance with the provisions of the Census and Apportionment Act of June 18, 1929, New York became entitled to 45 representatives instead of the 43 apportioned to it under the Act of 1911. This was an increase of two. How are the two to be elected?

The New York Legislature determined that it could be done by a joint resolution, and on April 10, 1931, divided the state into 45 congressional districts in this manner. The concurrent resolution, not being a law, was, of course, not submitted to the governor for his approval pursuant to the constitution of this state. This method of electing congressmen is here challenged on two grounds: First, because the Legislature must redistrict the state by a duly enacted law, and not by resolution, and second, if this be not so, the Act of Congress, August 8, 1911, is still in force and effect."

The Court continued:

The Constitution of the United States, Article I, section 4, provides: "The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the Legislature thereof, but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

By the Constitution of the State of New York, Article III, section 1, the legislative power of the state is vested in the senate and assembly. *"The law-making power, however, includes control or supervision by the*

governor, in so far as it is provided by Article IV of the constitution, section 9, that:

"Every bill which shall have passed the senate and assembly shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it, but if not, he shall return it with his objections to the house in which it shall have originated, which shall enter the objections at large on the journal and proceed to reconsider it. If after such reconsideration two-thirds of the members elected to that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members elected to that house, it shall become a law notwithstanding the objections of the governor." * * *

Shortly, thereafter, follows the excerpt heretofore quoted, ending with the words:

"We conclude therefore that the resolution of April 10, 1931, was ineffective, and that its attempted redistricting of the state is null and void."

The Court of Appeals concluded its opinion as follows:

"With this expression of our opinion, we hold that the resolution of April 10, 1931, is without effect; that 43 of the 45 congressmen are to be elected according to the districts created by chapter 890 of the Laws of 1911 of the State of New York, as amended, and the additional two will be elected at large by the entire state. This, of course, is in the absence of a law passed by the present Legislature now in session, redistricting the state into 45 congressional districts."

It is urged that this decision, in so far as the Court of Appeals has held that a statute may not be repealed or amended by concurrent resolution, is a finality.

Our Third Point has to do with federal statutes.

Sections 3 and 4 of the United States Code of Laws in force on December 7, 1925 (Vol. I, p. 18, Title 2, Chap. 1) read as follows:

> "Sec. 3. Election by districts. In each State entitled under this apportionment to more than one Representative, the Representatives to Congress *shall be elected by districts composed of a contiguous and compact territory,* and *containing* as nearly as practicable *an equal number of inhabitants.* The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative."
>
> "Sec. 4. Additional Representatives at large. *In case of an increase in the number of Representatives in any State* under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts prescribed by law on August 8, 1911, *until such State shall be redistricted in the manner provided by the laws thereof* and in accordance with the rules enumerated in section 3; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts prescribed by law on August 8, 1911, until such State shall be redistricted as herein prescribed."

These two sections were taken from Act of Congress of August 8, 1911, Sections 3 and 4, which we annex to this brief as an "Appendix".

We contend:

(1) That the Concurrent Resolution of April 10, 1931, violated the provisions of section 3 that the representatives of the Congress should be elected by districts *composed of a contiguous and compact territory and containing, as nearly as practicable, an equal number of inhabitants.*

(2) That the Concurrent Resolution also violated the provision of Section 4 that, in case of increase, redistricting shall be prescribed "in the manner provided *by the laws thereof*"; in other words, that redistricting by Concurrent Resolution is not redistricting "by law".

Section 3 is the only statute in existence, applicable to all the States in the United States, which requires that, in each State, the Legislatures in redistricting shall follow equitable rules. It may be that the Courts of some States, in the absence of statute, possess inherent power to void reckless and unfair redistricting. This is indicated in the opinion of the Court of Appeals. But certainly the only uniform statute on the subject is section 3, and so long as that statute continues, each State Court has only to determine the single question whether its Legislature has complied with that statute. Here, therefore, as in the Appellate Division and Court of Appeals, we will devote the greater part of our argument to the proposition that that statute is in full force and effect.

The Court of Appeals upheld this contention, saying:

> "Even if this were not so, we would be inclined to hold that the Act of Congress, August 8, 1911, was still in force and effect as a regulation to be followed in providing for the election of an additional number

of representatives. Section 3 of that act certainly is a general provision which practically can apply to any increase or decrease in the number of representatives. Section 4, while in terms limited to the apportionment under the Act of 1911, also provides and enacts a general rule which may be adapted to subsequent changes in the number of representatives, the rule being that additional representatives are to be elected at large and the others according to existing laws. This is simple, direct and universal. The Act of June 18, 1929, did not touch these matters, made no reference whatever to the provisions enacted in sections 3 and 4 of the Laws of 1911. The number of representatives in any given state was automatically readjusted upon the certificate of the President after each census. This was the only thing accomplished by the Act of June 18, 1929. We do not think that Congress intended to repeal the Act of 1911 or thought that it would terminate upon the passage of the subsequent act. The two should be read together, if possible. One provided for the method of election and the other merely for the number of representatives. The two can be read together as a fair and reasonable regulation by Congress for the election of its representatives, and this is the view we shall take of it."

POINTS.

FIRST.

Article I, Section 4 of the Constitution has been authoritatively construed by this Court.

I. As to this Point, we respectfully urge that no new question is presented for decision. This Court has construed the phrase, "prescribed in each State, by the Legislature thereof", to contemplate "legislative action", and has decided that, under that Article, each State may conclusively determine what body or officers or people comprise "the Legislature thereof", exercising "the legislative power", and has held that "legislative action" is called for by Article I, Section 4, and that that is "entirely different" from the use of the term Legislature in Article I, Section 3 or in Article V.

Ohio *v.* Davis, *supra;*
Hawke *v.* Smith, *supra.*

1. The Davis or Hildebrant case had to do with an Ohio redistricting statute. Under the Ohio Constitution, the law-making body of the State consists of the Legislature, in the restricted use of that term, the Governor *and the people upon a referendum.* The Legislature had passed the Act and the Governor had approved it, *but the people, upon a referendum, had disapproved it.* The Supreme Court of Ohio held that "while Article I, Section 4, of the United States Constitution is controlling upon the States in so far as it grants the legislature of the State authority

to prescribe the times, places and manner of holding elections, this is the *quantum* of the federal grant" and "the *character of the legislature, its composition and its potency as a legislative body*" are among the powers which, by Article X of said Constitution, are "expressly reserved to the states respectively, or to the people." Hence, "under the reserved power * * * the people *may create any agency as its lawmaking body,* or impose on such agency any checks or conditions under which a law may be enacted and become operative"—with the result that Article I, Section 4, *"should be construed as conferring" the power of redistricting "upon such bodies as may from time to time assume to exercise legislative power."*

State *v.* Hildebrant, 94 Ohio State, 154.

In this Court, as appears from the opinion of Mr. Chief Justice White, appellants challenged the decision that the Ohio referendum *was "a component part" of "the legislative authority" "empowered to deal with the election of members of Congress,"* and based their contention on (1) the State Constitution and laws, (2) *"the Constitution of the United States, especially Section 4 of Article I"*, and (3) the Act of Congress of August 8, 1911.

This Court overruled these contentions, and in affirming the Ohio Court disposed of each of the three claims separately.

2. The Hawke case had to do with the ratification of the 18th Amendment. It was an injunction suit, to enjoin a referendum upon a vote of ratification by the General Assembly. A demurrer was sustained in all the Ohio

Courts, the Supreme Court citing and relying upon the Davis or Hildebrant case, and arguing, in effect, as petitioners argue in this case, that the word "Legislature" should be given the same construction whether used in Article I, Section 4 or Article V. Judge Wanamaker, in a concurring opinion, went so far as to say (p. 398) that there is but one way to sustain the judgment against the referendum and that is "by reversing the Hildebrant case".

Hawke *v.* Smith, 100 Ohio State 385.

This Court reversed, but in so doing carefully distinguished between Article I, Section 4 and Article V, and made this distinction luminously clear.

Mr. Justice Day declared (p. 229) that the argument that a referendum was necessary for approval of a constitutional amendment "is fallacious in this—*ratification* by a State of a constitutional amendment is *not* an *act of legislation* within the proper sense of the word. It is *but the expression of the assent of the State* to a proposed amendment."

This Court made the following distinction (p. 230):

"The *power to legislate* * * * is derived from the people of the State."

"The *power to ratify* * * * has its source in the Federal Constitution. The *act of ratification* by the State derives its authority from the Federal Constitution to which the State and its people have alike assented."

Referring to Ohio *v.* Davis, it held that case to be "inapposite". It distinguished it by saying (p. 230):

> *"It dealt with Article I, Section 4 of the Constitution."*

And finally, in language which could be no more certain, it concluded as follows (p. 231):

> *"Article I, Sec. 4, plainly* gives authority to the State *to legislate* within the limitations therein named. Such *legislative action* is *entirely different* from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In *such expression, no legislative action* is authorized or required."

Mr. Justice Day also pointed to the distinction between redistricting and electing Senators, saying (pp. 227-8):

> "Article I, Sec. 3, provided that senators shall be chosen in each State by the legislature thereof, and this was the method of choosing senators until the adoption of the Seventeenth amendment which made provision for the election of senators by vote of the people, the electors to have the qualifications requisite for electors of the most numerous branch of the state legislature. That Congress and the States understood that this election by the people *was entirely distinct from legislative action* is shown by the provision of the amendment giving the legislature of any State the power to authorize the Executive to make temporary appointments until the people shall fill the vacancies by election."

In Davis *v.* Ohio, Mr. Chief Justice White used the following terms:

"the legislative power"; (four times)
"the legislative authority"; (four times)
"State legislative power".

Similarly, in Hawke *v.* Smith, Mr. Justice Day used the following terms:

(p. 228) "Legislative action"
(p. 229) "Act of legislation"
"Ordinary business of legislation"
(p. 230) "Ordinary cases of legislation"
"Power to legislate"
(p. 231) "Such legislative action"
"No legislative action"

II. As the Attorney General will show in his brief, it appears that from the date of the adoption of the Constitution down to 1931, the continuous and uninterrupted practice in all the States has been to accomplish the legislative act of redistricting by statute, initiated by bill and approved by the Governor (where a State Constitution so provides), in precisely the same manner that any other statute is enacted into law. This has been the continuous and uninterrupted practice in New York—until the Senate and Assembly, in 1931, saw fit to attempt a radical departure from the time-honored precedent by passing the Concurrent Resolution—as shown by:

New York Laws of 1789, Chap. 11,
" " " " 1792, " 5,
" " " " 1797, " 62,
" " " " 1801, " 64,

New York Laws of 1802, Chap. 72,
" " " " 1804, " 19,
" " " " 1808, " 170,
" " " " 1812, " 120,
" " " " 1818, " 126,
" " " " 1821, " 84,
" " " " 1822, " 250,
Revised Statutes, Part I, Chap. II, Title III,
Laws of 1832, Chap. 334,
" " 1842, " 325,
" " 1851, " 499,
" " 1862, " 454,
" " 1872, " 619, (Passed over Governor's veto),
" " 1873, " 798,
" " 1883, " 424,
" " 1892, " 295,
" " 1901, " 591,
" " 1902, " 298,
Consolidated Laws, Chap. 57, (Chap. 298, Laws of 1909),
Laws of 1911, Chap. 890,
" " 1915, " 340,
" " 1917, " 797,
" " 1917, " 799,
" " 1918, " 34,
" " 1918, " 250,
" " 1922, " 636.

This Court, as early as 1837, dealing with another instance of the power reserved by the States, declared that "a uniform course of action, involving the rights to the exercise of an important power by the State Governments,

for *half* a century" *"is no unsatisfactory evidence that the power is rightfully exercised"*.

Briscoe *v.* Bank, 36 U. S. (11 Peters) 256, 318.

In the venerable case of

Stuart *v.* Laird, 5 U. S. (1 Cranch) 298, 308,

it was held:

> "This practical exposition is *too strong and obstinate* to be shaken or controlled. *Of course,* the question is *at rest,* and *ought not now* to be disturbed."

III. Our learned adversary, in his oral argument before the Appellate Division, suggested that we contended that, at the time the Constitution was adopted, there was doubt in the meaning of the phrase, "prescribed in each State by the Legislature thereof". We, in answering, challenged counsel's statement and denied that we took that position. We assert it to be certain that, from the earliest times, the phrase in question was construed to contemplate legislative action by whomever each of the several States at that time and from time to time should determine to be its law-making body. In that connection, we referred the learned Appellate Division to the Federalist, and to Judge Story's Treatise on the Constitution, which as to this particular subject matter is in great part taken from the Federalist. We had had before us the briefs in Davis *v.* Ohio, wherein counsel relied heavily upon Judge Story's statements and we quoted from Judge Story's work at considerable length in our brief.

The Federal Constitution nowhere seeks to interfere with the States with respect to the distribution of legisla-

tive powers in the State. Not a line can be found in the Federal instrument interfering with the full power of each State to distribute the legislative powers as it may see fit. The Legislature of a State may consist of one House, two Houses, or either one or two Houses in conjunction with the Governor, or one or two Houses in conjunction with the Governor or a referendum to the people. In New York, it consists of Senate, Assembly and Governor.

Matter of Doyle, *supra.*

When Section 4 of Article I was adopted, there was no contention over the question how to get the expression of the State with reference to the election of representatives. The Legislature, however composed, represented the supreme will of the State and its sovereign power and in leaving the question to the Legislature of a State it was leaving the question to the State itself.

This section attracted little attention in the Convention. It was, however, assailed by opponents of the Constitution, both in and out of the State Conventions, with uncommon zeal and virulence. The objection was not directed to that part of the clause which vested in the Legislature of each State the power of prescribing the times, places and manner of holding elections, *because, to that extent, it was a surrender of power by the Federal Government to the State Governments.* The objection was directed to the second clause, which reserved a superintending power in Congress to make or alter such regulations. It was said that such a superintending power would be dangerous to the liberties of the people and to the just exercise of their privileges in Congressional elections.

Story on the Constitution, Vol. I, Sec. 815.

Thus, in the Davis case, counsel before this Court pointed out that, if those who violently assailed Section 4 of Article I of the Constitution because of its second clause and not because of its first clause, had had in mind that the phrase "by the Legislature thereof" contained in the first clause, involved any limitation whatsoever upon the State beyond the law-making power, it is reasonable to assume that such limitation would also have been violently opposed. If it had been understood that the expression "prescribed in each State by the Legislature thereof" had a restrictive meaning, it is wholly inexplicable that the opponents of the Constitution in the various State Conventions did not challenge the first clause quite as vigorously as they challenged the second. A contention to the contrary, if carried out, would be that the Federal Government, by virtue of Section 4 of Article I of the Constitution, would have the right to determine for each State what its Legislature is. It was not the policy of the Constitution to restrict the people of a State in the exercise of their wish to limit the legislative power, either by a Revision Commission or by the Governor, or by a referendum, or otherwise.

IV. We are proceeding with the preparation of our brief without the benefit of first having seen appellant's brief. Our arguments therefore relate to their briefs in the State Courts. Their arguments below appear to be substantially as follows:

They commence with Article I, Sec. 4, and the following quotation from Mr. Justice Day's opinion in Hawke *v.* Smith:

> "That (the word 'legislature') was not a term of uncertain meaning when incorporated into the Con-

stitution. What it meant when adopted it still means for the purpose of interpretation. A legislature was then the representative body which made the laws of the people."

They argue that the language used in Article I, Section 4, was not "in accordance with laws established by the respective States", and continue:

"The reason is clear," and they set forth the constituents of the various State Legislatures at the time the Federal Constitution was adopted, and argue that since, in a majority of them, the Governor at that time did not have the power of approval or veto, the phrase must have been used in a restricted sense, (1) even though this Court has held that it meant the whole law-making body and (2) even though, in New York and Massachusetts at least, the Legislature was not the whole law-making body.

They thus "seize upon" (Staley, *J.*) a single quotation from Mr. Justice Day's opinion in the Hawke case *at a point when he was discussing Article V; not* Article I, Section 4. That is not this case. Mr. Justice Day held that that is not this case. His meaning is found in what the Court actually held, explained by such phrases as:

"*Ratification by a State* is not *an act of legislation.*"

"*Article I, sec. 4, plainly* gives authority to the State to *legislate*".

"*Such legislative action* is *entirely different* from" ratification of a Constitutional Amendment.

They have also argued that "there is no escaping the conclusion that the word 'Legislature' as used in Section 4 of

Article I * * * means precisely the same thing as it means in Section 3 of Article I of the same document" (choosing United States Senators).

The question is rather what *basis* is there for this "conclusion" of the petitioners; it is not a question of "escaping".

As a matter of fact, there is no basis at all for this conclusion; because this Court, in Hawke *v.* Smith held otherwise (*ante*, p. 16).

It is indisputable that the words (1) "the Congress" and (2) "Legislature" are used in different senses in the federal Constitution, either (1) as the whole law-making Department or (2) as Senate and House of Representatives alone or State Senates and Houses alone. By analogy, the New York Constitution usually uses the word "Legislature" as the whole law-making body, but it occasionally uses the term in the limited sense of the Senate and Assembly alone—Unquestionably, each use of the word must be determined for itself, if not already determined, as here; and the test which this Court has applied has been, What is the *function* of the body under the particular constitutional mandate?

The distinction is to be found in the Constitution itself.

The House of Representatives represents *the people*.

The Senate of the United States represents *the various States*.

A State Legislature in "prescribing the times, places and manner of holding elections for representatives" is acting for the people, and its prescribing of districts is a law-making function and is to be exercised in the same manner in which all other laws are enacted. The Legislature in

"choosing Senators" acts as a body of voters exercising a power prescribed by the Federal Constitution and not as a law-making body at all, as Judge Story observes.

In one case, as this Court has held, the Legislature is exercising a legislative function; and the fact is that for over a century in each State the entire law enacting body has acted by law. In the other case, the House or Houses are merely called upon to answer a roll call—clearly exercising no part of a law-making function. For instance, when a bi-cameral body is called on "to choose" a United States Senator, the members of both houses vote for their choice as a single body,—which would be wholly unconstitutional in the case of passing a bill.

SECOND.

The New York Senate and Assembly was without power, by Concurrent Resolution, to repeal Chapter 890 of the Laws of 1911, as amended, or the Election Law.

I. In New York State, the "Legislature", considered as Senate and Assembly, has never been the law-making body of the State. Counsel for the petitioners, in their briefs in the State Courts, conceded that New York, by its Constitution of 1777, provided for a "Revision Commission", which had jurisdiction "to return" a proposed law. That Commission included the Governor. In 1821, the New York Constitution abolished the Commission and conferred on the Governor alone the power to approve or disapprove all

bills. In Matter of Doyle, the Court of Appeals said (p. 261):

> "In the State of New York the "law-making" department is not the Legislature alone, but the Legislature and the Governor, the one as much as the other *an essential factor in the process.* We beg the question when we argue that the Legislature may give immunity because the Legislature is the sole custodian of the legislative power. *It is not the sole custodian of that power. Power is divided between the Legislature and the Governor."*

And it summarized its decision as follows:

> "The Legislature can *initiate,* but without the action of the Governor it is *powerless* to *complete."*

We have already pointed out that, in New York State, for over one hundred years, every Congressional reapportionment has been "prescribed" by the law-making Department, that is, by bill "initiated" by Senate and Assembly and "completed" by the Governor by executive approval.

The latest of these statutes, thus enacted, was Chapter 890 of the New York Laws of 1911. That Act *repealed* all prior laws (Sec. 3). It has been frequently amended *by law* (Laws of 1915, Chap. 340, Laws of 1917, Chap. 797, 799, Laws of 1918, Chap. 34, 250, Laws of 1922, Chap. 636).

Statutory provisions as to congressional districts and elections are also contained in the Election Law.

See Election Law, Secs. 21, 69, 131, sub-div. 1, 276-8, 298.

The Concurrent Resolution, on which petitioners rely, is designed to totally supersede Chapter 890 of the Laws of 1911, and conflicting provisions of the Election Law, although it generously recites that "provisions of the Election Law, in so far as they are *not* inconsistent * * * shall *continue* in force *until repealed!*"

The Court of Appeals passed on this 1911 State Apportionment Act in People *ex rel.* Fitzgerald *v.* Voorhis, 222 N. Y. 494.

It said (p. 497):

> "After the apportionment thus made it at once became and thereafter continued to be *the duty of the legislature* of the State of New York to comply with the act by dividing the state into forty-three congressional districts in the manner prescribed. *This it did by the act of 1911,* but its power was not thereby exhausted nor its duty fully performed. *It still remained obligated* to keep the state so divided into congressional districts that members thereafter elected should be from districts composed of contiguous and compact territory containing as nearly as practicable an equal number of inhabitants. *The language used in the congressional act indicates as clearly as anything can that Congress in its enactment took into consideration the fact* that after a state had once been divided into congressional districts, by reason of shifting population, it might, from time to time, become necessary to redistrict it in order fully to comply with the intent and purpose of the act. *The division directed to be made was not only for the sixty-third, but 'each subsequent Congress'*".

The framers of the Concurrent Resolution did not include an *express* repeal of this statute and its amendments. They attempted, by Resolution, *to write a different law!*

In Matter of Doyle, the Court of Appeals further said (p. 259):

> "Never has it been held that *a legislature* alone may suspend the criminal *law* * * *. The rule is said to be that a *resolution* of the House of Commons is invalid and of no effect *if in conflict with existing law* * * *. *We cannot bring ourselves to believe that the efficacy of resolutions is any greater in New York.*"

and again (pp. 261-2):

> "The grant of an immunity *is* in very truth *the assumption of a legislative power* and *that is why* the legislature, *acting alone,* is *incompetent* to declare it. It is the assumption of a power to annul as to individuals or classes *the statutory law* of crimes, * * * All these changes *may be wrought through the enactment of a statute.* They may be wrought *in no other way* while the legislative structure of our Government continues what it is."

It is our claim that *the repeal of Chapter 890 of the Laws of 1911, and the pertinent sections of the Election Law* "may be wrought through the enactment of a statute. *They may be wrought in no other way while the legislative structure of our government continues what it is.*"

II. Our learned adversary, in his oral argument in the Appellate Division, argued in words and substance:

> "I have tried to explain to my opponents, both in my argument before Judge Staley and here, that I am

> not claiming that the State and Federal Acts of 1911 were repealed or superseded. My claim is that the State Act of 1911 and the Federal Act of 1911 were *temporary* acts which have *expired*."

It is not claimed that these acts have been slain by express repeal nor lulled into a last sleep by implied repeal or implied substitution, but that they are of a temporary and evanescent nature, and quite simply, no longer exist.

We will deal with the Federal Act in Point Third. The nature of a State Apportionment Act has been defined by the Court of Appeals.

Rumsey *v.* The People, 19 N. Y. 41.

There, the Court held (p. 50):

> "It was undoubtedly incumbent upon the Legislature to reorganize the districts, as soon as that might be done after the State census. But if that body was remiss in performing that duty, its tardiness would not, nor would any of its effects, so operate as to repeal a pre-existing statute predicated upon a supposition that there would be punctuality in conforming to the exigencies."

As the learned Attorney General has pointed out:

> "The language there used might be almost written for the instant case."

We urge, with great respect, that the provisions of the State Constitution and the State decisions herein referred to are decisive upon the point that this State statute and the Election Law may not be amended by mere concurrent resolutions and hence, as held by the Court of Appeals, must be still in full force and effect.

THIRD.

Act of Congress of 1929 did not repeal secs. 3 and 4 of the Act of Congress of 1911, nor the U. S. Code.

I. In approaching this question, let us, in the first place, make it clear that the Congress, in connection with each new census and apportionment, has dealt and may deal with three entirely different subjects:

Subject No. 1, Census.

Subject No. 2, Apportionment, or number of representatives of the several States *in the House*.

Subject No. 3, Provisions governing the various State Legislatures in prescribing elections *within* the several States.

II. We propose to show in detail how the Acts of 1911 and 1929 dealt with these three subjects, and to what extent, but before proceeding to do so, we present the following Table:

Subject of Legislation	*Act of 1911*	*Act of 1929*
ubject 1. Provisions for a Census:	Not a word!	21 out of 22 sections.
2. Provisions for the number of representatives which each State shall have in the House:	Secs. 1-2 Table of States with numbers of representatives.	Pending Congressional le lation, sec. 22 provide formula for figuring a ra
3. Provisions governing the Legislatures of the several States in districting:	Sections 3-4. The only law on this subject, now part of the U. S. Code,—being the provisions which appellants here ask the Court to hold to be no longer in existence.	*Not a word!*

III. The Act of 1929, which is printed in the record (Exhibit A) did *not* contain any provision *expressly re-*

pealing Sections 3 and 4 of the Act of 1911 (Appendix, *post,* pp. 46-48) or of the U. S. Code (*ante,* p. 10).

Sections 1 to 21 of the Act of 1929 provided for a new *census.* Section 22 provided for *a new formula* for what may be called a Presidential apportionment.

Moreover, the Act of 1929, in dealing with apportionment (Subject No. 2), expressly provides for its own repeal by providing that it is only to be effective if the Congress *"fails* to enact *a law apportioning* Representatives among the several States".

So far as we can see, the several States today are operating under the entire statute of 1911, prescribing four hundred and thirty-three members (*post,* p. 46), *the sole variance being that, until a new statute has been passed, which has not yet been passed, there should be a new formula for dividing these four hundred and thirty-three members between the several States upon a new ratio based on a new census.*

Moreover, Section 22 of the 1929 Act explicitly distinguishes between "a reapportionment" by Congress, *i. e.,* "a law apportioning representatives among the several States", and an automatic change in the number of representatives *"based upon the method* used in the last preceding apportionment" (R. 31).

Incidentally, it is to be noted that Section 3 of the U. S. Code and the Act of 1911 specifically look to the future, and use the words "the Representatives to the Sixty-third *and each subsequent Congress, etc."!*

Rumsey *v.* The People, *supra.*

The only word in Sections 3 and 4 of the U. S. Code or Act of 1911 which might indicate that those provisions died with the temporary suspension of Sections 1 and 2 (dealing with a different subject) is the word "this" in the phrase "under this apportionment", which appears in both sections.

Subjects Nos. 2 and 3, are dealt with in the Act, *by separate sections,* Sections 1 and 2 dealing with Subject No. 2 and Sections 3 and 4 dealing with Subject No. 3.

The word "this" in the phrase "under this apportionment", is a word either of description or of limitation. *So far as the Act of 1911 is concerned,* it made no difference, because it applied to that Act in either event. The question before the Court is whether the word limits the operation of the Act of 1911 to the numerical distribution of representatives made by that Act or may extend to a redistribution by Executive action based on that Act, pending a Congressional reapportionment. It is our position that, in determining such a question, the word "this" should be construed as one of description.

Coyle *v.* Oklahoma, 221 U. S. 559, 567;
People *v.* Worden, 187 N. Y. 322, 326-7;
Brown *v.* City, 241 N. Y. 96, 110-111.

As to implied repeal or substitution, the rule as laid down by this Court is emphatic. Where one act follows another in point of time, it is ordinarily and usually held to supersede *only* such previous legislation as is *inconsistent, even though a literal construction might indicate a complete substitution.* This is because "repeals by implication are *not* favored and when two statutes cover in whole or in part

the same matter *and are not absolutely irreconcilable,* effect should be given, *if possible,* to *both* of them."

U. S. *v.* Greathouse, 166 U. S. 601, 605;
U. S. *v.* Lee Yen Tai, 185 U. S. 213, 221;
Washington *v.* Miller, 235 U. S. 422, 428;
Graham *v.* Goodcell, 282 U. S. 409, 425.

1. In U. S. *v.* Lee Yen Tai, this Court held (p. 221):

"In the cases of statutes alleged to be inconsistent with each other in whole or in part, the rule is well established that effect must be given to both *if by any reasonable interpretation* that can be done; that 'there must be a *positive repugnancy* between the provisions of the new laws and those of the old; *and even then the old law is repealed* by implication *only pro tanto,* to the extent of the repugnancy'; and that if harmony is impossible, and only in that event, the former is repealed in part or wholly, as the case may be".

2. This Court, in Graham *v.* Goodcell said (p. 425):

"Section 3 of the latter act does not expressly repeal section 611 of the Revenue Act of 1928, and the question is whether there is a repeal by implication * * * Repeal will not be implied unless there is *a positive repugnancy* between the provisions of the new law and those of the old * * *".

IV. But, our learned adversaries admonish us (*ante,* p. 27), their claim is not of implied repeal or substitution, but of death of that which was only temporary.

We make two answers:

1. The question as to whether a temporary statute has died *is* the question whether there has been implied repeal or substitution.

2. Sections 3 and 4 were not temporary provisions, and Congress made its intent plain that it did not repeal them.

For these propositions, we will first cite two well considered authorities, and will then deal with a subject teeming with interest—The express intent of Congress, as seen by (1) the history of the bill, (2) Senate Report and (3) House ruling.

The authorities on which we rely are:

U. S. *v.* Gear, 44 U. S. (3 How.) 120;
The Reform, 70 U. S. (3 Wall.) 617.

1. In U. S. *v.* Gear, the question was whether an Act of 1834 required the President to cause to be offered for sale public lands containing lead mines. It was argued that Section 5 of an Act of 1807 was still in force, which would not require the President to cause the lands to be sold. This Court sustained that contention. Its decision is important, both on the point that the Act of 1807 was not a temporary statute, and also on the incidental point (which we urge) that the questions of temporary statute and implied repeal are essentially one and the same. This Court held (p. 131):

> "In truth, the acts of 1834 and 1807 do not present a case of conflict in the sense in which statutes do, when, from some expression in a later act, it may seem that something was intended to be excepted from the force of the former, *or to operate as a partial repeal of it.* The rule is, that a *perpetual* statute, (*which all statutes are unless limited to a particular time,*) until *repealed* by an act professing to repeal it, or by a clause or section of another act *directly bearing in terms* upon the *particular matter* of the first act, notwithstanding

an implication to the contrary may be raised by a general law which embraces the subject-matter, *is considered still to be the law in force as to the particulars of the subject-matter legislated upon,"*.

2. The Reform had to do with an Act of 1861, to provide for the collection of duties on imports. That act provided that, on proclamation by the President, intercourse was made unlawful between citizens of those parts of the United States in insurrection with citizens of the rest of the United States, *"so long as such condition of hostility should continue"*. This Court held that that was not a temporary act. It said (p. 629):

> "Respondents are correct in supposing that a forfeiture incurred under a penal statute, temporary in its terms, cannot be enforced after the statute has expired, and that the repeal of a penal statute has the same effect, unless the repealing law contains a saving clause as to pending prosecutions. Many authorities were cited in support of these propositions; but it does not seem to be necessary to give them much examination, as the propositions are elementary and undeniable. Granting all this, however, still it is quite evident that the motion cannot prevail, because the act of Congress under consideration was not a temporary act, as assumed by the respondents, nor has it ever been repealed. *On the contrary, it is a general law without any limitation as to its duration,* and is still in full force for the recovery of penalties, or for the enforcement of forfeitures incurred during the insurrection, and before the termination of hostilities. *Restrictions upon commercial intercourse were limited to the period of the continuance of hostilities; but there was no limitation as to the duration of the act of Congress.* Ces-

sation of hostilities restored the right of commercial intercourse; but the restoration of such intercourse *could not have the effect to repeal* the act of Congress which suspended such intercourse during the continuance of hostilities, or to exonerate a vessel or cargo from a forfeiture incurred for a violation of the restrictions while they were in full operation."

We now come to the express intent of Congress.

It will be found:

(1) That, in sharp contrast to the Act of 1911, the first twenty-one sections of the Act of 1929 are devoted to Subject No. 1, Census, a subject not dealt with by the Act of 1911;

(2) That it devotes a single section, section 22, to Subject No. 2, an addendum to the Census Act, and so far as Subject No. 2 is concerned, it differs from the Act of 1911, in that it does not set forth a Schedule of States, with numbers of representatives, but merely provides a formula for human activity, for ascertaining a ratio for dividing the total representation prescribed by the 1911 Act which the several States shall have in the House after the Census should be taken, or as the Senate Committee reported: "a new application of these fixed indices to the new enumeration" (*post*, p. 39).

(3) *Most particularly, the Act of 1929 does not deal, or purport to deal, in any way, shape or manner with Subject No. 3!*

We respectfully urge that, under such analysis, the Act of 1929 can not be a "substitute" for the Act of 1911 or impliedly "repeal" it.

Let us, however, clinch our point by exhibiting the following legislative *facts*:

(1) In 1929, the record of Congress for the past nine years had been that Congress had refused to translate the 1920 census into a new apportionment. The Senate Committee on Commerce, in a report, dated April 23, 1929, said:

> "As a result, great American constituencies have been robbed of their rightful share of representation, not only in the Congress itself, but also in the Presidential Electoral College. * * * So large a factor of misrepresentation is a travesty upon representative democracy, a flagrant mockery of constitutional equalities, an ugly hazard to domestic tranquility, and an insufferable affront to victimized states."

(2) Something over a year prior to this report, on December 5, 1927, Representative Fenn had introduced in the House a bill, numbered HR393, entitled as follows:

> "A BILL to provide for the Fifteenth and subsequent decennial censuses."

That bill was a census bill, consisting of nineteen sections. The first eighteen of these sections, for all practical purposes, are substantially the same as the first twenty sections of the Act of 1929, subsequently adopted, *and Section 19 of the bill, having to do with repeal, was absolutely identical with Sections 21 of the Act of 1929* (R. 30).

It was also absolutely identical with Sec. 34 of the Census Act of 1919 except that the Act repealed is the Census Act of 1919, instead of the Census Act of 1909.

Of course, Section 19 (now Section 21) *at that time* referred to census provisions and census provisions only, and it may be noted at this point that, during the long and weary pilgrimage of the bill through the House, Senate and back to the House again, that section, whether numbered 19 or 21, was never amended *and never lost its appropriate place in the bill or in the law immediately following the census sections!*

(3) On May 2, 1928, H. R. 393 was reported by the House Committee on Census; on May 21, 1928 it passed the House, on May 22, 1928, it was referred to the Senate Committee on Commerce, and on December 12, 1928, it was reported by the Committee; *and during all this period it still remained strictly a Census bill.*

(4) On April 22-23, 1929, a bill was introduced in the Senate, numbered S. 312, committed to the Committee on Commerce and reported. The Committee's report upon S. 312 says:

> "The part of the bill relating to the census is substantially the same as the bill which passed the House last session."

That disposes of the first twenty-one sections. There was only one other section, Section 22 (R. 30-32).

The title of the bill was changed by *adding* the words, "and to provide for apportionment of representatives in Congress", so that the whole title read:

> "An Act to provide for the fifteenth and subsequent decennial census, and to provide for apportionment of representatives in Congress."

(5) The only thing, therefore, which remains to be considered is new Section 22, which the Senate tacked on to the complete Census bill as an addendum.

This addendum provided merely for individual action by officers of Government, and provided only *for a formula* for determining *the ratio* of representatives from the several States in Congress (Subject No. 2). It provided that that individual action and that that formula should become operative *only if Congress should fail to enact a new apportionment act* specifically enumerating the various States and their respective number of representatives (R. 31).

The Committee on Commerce, in its report accompanying the bill, set forth, as above quoted, the scandalous condition of misrepresentation *in the House itself* (Subject No. 2), which had arisen by reason of the failure of Congress to act for the intervening nine years since the last census had been taken.

The meaning and intent of new Section 22 is luminously set forth in the Committee's report:

> "Need for the bill.
>
> " * * * The Federalist Papers, oracle of the Constitution, said: 'A power equal to every possible contingency must exist somewhere in the Government.' Without this proposed legislation, where is the 'power' to compel effective attention to the serious 'contingency' created by the failure of Congress to apportion Representatives as the Constitution requires? Where is the 'power' which shall protect the paramount theory of representative equality in our system of constitutional government? The 'power' is lacking until this law is passed.

What is Proposed?

The theory of this legislation, as originated by the House in the last session, is that in every decennium the Congress shall have a free opportunity—as is its right and responsibility—to translate the current census into a new apportionment on whatever basis it pleases.

There is no disposition or *effect in this law which delimits freedom of action by Congress* in this respect. *This law does not operate unless Congress fails to act.*

In other words, it takes from Congress nothing except *the right of inertia—the privilege of capitalizing inaction into a constitutional affront.*

Even then *it accepts whatever decisions Congress itself may have last made* as to the size of the House or the mathematical method of apportionment, *and fits these indices to the new census enumeration.*

It preserves the status quo in every respect except as the *new census* requires, under the Constitution, a *new application* of *these* fixed indices to the *new enumertion* * * * .

The primary purpose of this proposal is to cure a basis statutory flaw and cure it with *a formula* which will be just as applicable in 1940 or 1950 or 1960 as in 1930. * * *

Objections.

The objection that this is an improper 'delegation of power' to the Department of Commerce (which takes the census) and to the President (who reports the arithmetic) is answered by an examination of the facts. No power whatever is delegated. The Department of Commerce counts the people (as it always has done) and the President *reports upon a problem in mathematics* which is standard, and *for which rigid*

specifications are provided by Congress itself, and to which there can be but one mathematical answer. Congress always has and always will depend upon outside experts to do this mathematical problem. The usual situation in this respect is not changed. * * *"

Committee reports stand on a "solid footing".

Duplex Co. *v.* Deering, 254 U. S. 443, 474;
Caminetti *v.* U. S., 242 U. S. 470, 490.

They may be taken as a "guide" to "true interpretation",

Oceanic Navigation Co. *v.* Stranahan, 214 U. S. 320, 332.

The report just quoted makes it positive that the *sole purpose* of new Section 22, added to the Census bill, was *to deal with Subject No. 2*, and by so dealing, *to remedy, by a new and conditional expedient, a public scandal which had persisted for nine years.*

It further appears that the statute itself contemplated that Congress itself should act by a specific apportionment act (like Sections 1 and 2 of the Act of 1911) and that, if it did so, Section 22 was to be void.

We respectfully urge that this new conditional expedient of individual action and the provision for a new formula to cure the scandal as to Subject 2 could not, in the nature of things, alter a wholly different subject (Subject 3), to wit, how the Legislatures of the several States should prescribe for districting within their several boundaries.

(6) We will not attempt to give the whole history of S. 312 in the Senate or subsequently in the House of Representatives. The bill passed the Senate, for all practical

purposes, in the same form as it was introduced in the Senate; it was debated in the House, and was sent to at least two conference Committees of Senate and House.

In the House, the bill was actively debated for about five days. Except for a single proposed amendment, it clearly appears that no member of the House was under any misapprehension at any time that the proposal had anything to do with Subject No. 3. Members discussed the scope of the census, the time of taking it, the question of aliens, civil service, unemployment and the radio.

At only one point was the application of the bill to Subject No. 3 raised or discussed, and that was when Congressman Reed twice offered an amendment *to expressly permit a State Legislature to redistrict by Concurrent resolution!* What should be particularly noted follows:

(a) Congressman O'Connor made the point of order that the Reed amendment was *"not germane to the bill"! In other words, his point of order was that the Congress was not legislating as to Subject No. 3.* The Chair *sustained* the point of order! The effect of that ruling was to hold that Congress was not dealing with Subject No. 3.

(b) Congressman Reed reoffered his amendment in slightly modified form. During the debate on this offer, it was suggested that perhaps the bill might in some way repeal the provisions of the Act of 1911 as to Subject No. 3. Here, however, the Chair made it absolutely positive that this could not be, ruling as follows (Congressional Record, Vol. 71, Part 3, pages 2444-5):

> "On Tuesday last the Chair ruled upon this same amendment when offered at another point, and stated

> that *there is nothing in the present bill which relates to the subject matter of the amendment,* which subject matter is *the action of the State Legislature and of State authorities in redistricting* a State upon the basis of a reapportionment of members of the House made by Congress. No argument has been made today which controverts the position which the Chair took at that time. *The Chair takes it that no one is prepared to claim that there is anything in the bill pending before us—S. 312—which directly relates to the matter of the redistricting of the States* * * *. It seems to the Chair *very clearly* that the amendment offered by the gentleman from New York (Mr. Reed) is *not germane to the pending bill;* and the Chair sustains the point of order."

In this ruling, the Chair declares in effect that the House was unanimous that there was nothing in the bill which related to State redistricting.

We respectfully urge that that cannot be repugnant (*ante,* p. 32) which is "not germane"?

The plain purpose of Congress in tacking Section 22 on to this Census bill was to deal with Subjects 1 and 2 and not with Subject 3, and we urge that a Law dealing with such subjects can hardly be held to be "a substitute" for sections of a prior Act, in so far as it deals with a different subject altogether, or that it repeals them.

V. The appellants have not relied on the repeal clause set forth in section 21.

(1) This repeal provision is the familiar Census repeal provision (*ante,* p. 36), having direct relation to census

and census only, and it was carefully continued in the same place in the law when the new provision having to do with the apportionment was subsequently tacked on. It clearly relates to the Census provisions.

(2) But, even if this were not so, this Court has construed such provisions as "that all acts and parts of acts inconsistent with the provisions of this act are hereby repealed" as follows:

(A) It is quite inadmissible to predicate upon such express declaration of legislative intent an implication of more extensive repeal!

(B) By necessary implication, previous statutes that *are consistent* with its provisions must be held to be *unaffected!*

Hendersons Tobacco, 78 U. S. 652;
Hess *v.* Reynolds, 113 U. S. 73, 79;
Holden *v.* Minnesota, 137 U. S. 483, 491;
Kennedy *v.* United States, 265 U. S. 344.

VI. The Court of Appeals sustained our contention as to this question. The Appellate Division did not deal with it, except for Mr. Justice Hill's statement, in his concurring opinion (R. 123), that "the Federal Act of 1911 by its terms was limited to the apportionment following the 13th Census". Mr. Justice Staley, however, discussed it. He stated that "after the Census of 1910—the Thirteenth Census—the Congress, in accordance with its custom following other Censuses, passed an Act which apportioned the members of the House of Representatives among the several States". We admit that in order to avoid recurring decennial *mis*representation of the several States in the

House, this *should* be the custom; but the fact is (1) that Congress never passed an Apportionment Act following the *Fourteenth* Census, and that (2) the Act of 1929 did not *follow* the *Fifteenth* Census, but was the Census Act itself, plus a formula to provide a ratio IN CASE CONGRESS SHOULD NOT PASS THE VERY APPORTIONMENT ACT TO WHICH THE LEARNED TRIAL JUSTICE APPARENTLY REFERRED, BUT WHICH NEVER YET HAS BEEN PASSED!

The learned Justice further stated that the provisions of the Act of 1929 were "limited by its language to the apportionment under the Thirteenth Census", and therefore "has no force or application to an apportionment under the Fifteenth Census" (R. 97). Here, again, he falls into the same error; but, in addition, groups together, in a single sentence, the two entirely distinct subjects of legislation which made up the Act of 1911, and ignores the fact that the "Census and Formula Act of 1929" does not deal, or purport to deal, in any way, shape or manner, with one of these subjects, to wit, Congressional limitations governing the Legislatures of the various States in prescribing districting within the States. It should be recorded, however, that at the time of the argument before him, we had not had time to digest the bills, records and documents in Congress and were not in a position to present to him the arguments or decisions herein presented.

FOURTH.

We ask that the order appealed from be affirmed.

Washington, March 24, 1932.

JOHN GODFREY SAXE,
Attorney for Respondent-Intervenor,
James A. Farley, Chairman of the
State Committee of the Democratic
Party.

ROBERT F. WAGNER,
JOHN GODFREY SAXE,
JOHN J. O'CONNOR,
of Counsel.

APPENDIX.

Act of Congress of August 8, 1911.

CHAP. 5.—An Act For the apportionment of Representatives in Congress among the several States under the Thirteenth Census.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That after the third day of March, nineteen hundred and thirteen, the House of Representatives shall be composed of four hundred and thirty-three Members, to be apportioned among the several States as Follows:

Alabama, ten.
Arkansas, seven.
California, eleven.
Colorado, four.
Connecticut, five.
Delaware, one.
Florida, four.
Georgia, twelve.
Idaho, two.
Illinois, twenty-seven.
Indiana, thirteen.
Iowa, eleven.
Kansas, eight.
Kentucky, eleven.
Louisiana, eight.
Maine, four.
Maryland, six.
Massachusetts, sixteen.
Michigan, thirteen.

Minnesota, ten.
Mississippi, eight.
Missouri, sixteen.
Montana, two.
Nebraska, six.
Nevada, one.
New Hampshire, two.
New Jersey, twelve.
New York, forty-three.
North Carolina, ten.
North Dokota, three.
Ohio, twenty-two.
Oklahoma, eight.
Oregon, three.
Pennsylvania, thirty-six.
Rhode Island, three.
South Carolina, seven.
South Dakota, three.
Tennessee, ten.
Texas, eighteen.
Utah, two.
Vermont, two.
Virginia, ten.
Washington, five.
West Virginia, six.
Wisconsin, eleven.
Wyoming, one.

SEC. 2. That if the Territories of Arizona and New Mexico shall become States in the Union *before the apportionment of* Representatives *under the next decennial census* they shall have one Representative each, and if one of such Territories shall so become a State, such State shall have one Representative, which Representative or Representatives shall be in addition to the number four hundred

and thirty-three, as provided in section one of this Act, and all laws and parts of laws in conflict with this section are to that extent hereby repealed.

SEC. 3. That in each State *entitled under this apportionment* to more than one Represenative, the Representatives to the Sixty-third *and each subsequent Congress* shall be elected *by districts* composed of *a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants.* The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

SEC. 4. That in case of *an increase* in the number of Representatives in any State *under this apportionment* such additional Representative or Representatives shall be elected by the State at large and the other Represenatives by the districts *now prescribed by law* until such State shall be redistricted *in the manner provided by the laws thereof* and in accordance with the rules enumerated in section three of this Act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts *now prescribed by law* until such State shall be redistricted as herein prescribed.

SEC. 5. That candidates for Representative or Representatives to be elected at large in any State shall be nominated in the same manner as candidates for governor, unless otherwise provided by the laws of such State.

Approved, August 8, 1911.

SUPREME COURT OF THE UNITED STATES.

No. 731.—October Term, 1931.

Samuel S. Koenig, John J. Knewitz, and William L. Ward, Petitioners, *vs.* Edward J. Flynn, Secretary of State of the State of New York, et al.	On Writ of Certiorari to the Supreme Court of the State of New York.

[April 11, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The petitioners, 'citizens and voters' of the State, sought a writ of mandamus to compel the Secretary of State of New York, in issuing certificates for the election of representatives in Congress, to certify that they are to be elected in the congressional districts defined in the concurrent resolution of the Senate and Assembly of the State, adopted April 10, 1931. The Secretary of State, invoking the provisions of Article I, section 4, of the Constitution of the United States, and those of the Act of Congress of August 8, 1911, c. 5, 37 Stat. 13, and also the requirements of the constitution of the State in relation to the enactment of laws, alleged that the concurrent resolution in question was ineffective, as it had not been submitted to the Governor for approval and had not been approved by him. The Court of Appeals of the State, construing the Federal constitutional provision as contemplating the exercise of the lawmaking power, sustained the respondent's defense and affirmed the decision of the lower courts refusing the writ. 258 N. Y. 292. This Court granted a writ of certiorari.

The State of New York, under the reapportionment pursuant to the Act of Congress of June 18, 1929, c. 28, 46 Stat. 21, 26, is entitled to forty-five representatives in Congress in place of forty-three, the number allotted under the previous apportionment. The Court of Appeals decided that, in the absence of a new districting statute dividing the State into forty-five congressional

districts, forty-three representatives are to be elected in the existing districts as defined by the state law, and the two additional representatives by the State at large.

For the reasons stated in the opinion in No. 617, *Smiley* v. *Holm*, decided this day, the judgment is affirmed.

Judgment affirmed.

Mr. Justice CARDOZO took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.